A

AMIN RAVAN v. MENTERI DALAM NEGERI & ORS

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
HASAN LAH FCJ
B ZAINUN ALI FCJ
JEFFREY TAN FCJ
[CRIMINAL APPEAL NO: 05-137-06-2014(W)]
14 SEPTEMBER 2015

C ***CRIMINAL PROCEDURE:*** *Extradition – Order of committal – Appeal against – Detention of appellant pending issuance of extradition order – Whether lawful – Appellant allegedly a fugitive criminal required to attend hearing in United States of America (US) – Whether offences allegedly committed by appellant extraterritorial offences in US but not in Malaysia – Whether there was corresponding offence in*
D *Malaysia which has extraterritorial effect – Dual criminality requirements under s. 6(2) and s. 20(1) of Extradition Act 1992 – Whether complied with – Effect approach and continuing approach – Whether only rationalises jurisdiction of requesting state – Whether changes an extraterritorial offence to territorial offence – Whether requested state may refuse extradition when there is no corresponding*
E *extraterritorial jurisdiction – Whether offences allegedly committed by appellant had no extraterritorial application under s. 4 of Penal Code – Whether appellant could be extradited – Whether habeas corpus should be granted – Extra-Territorial Offences Act 1976, s. 2(1)*

CRIMINAL PROCEDURE : *Habeas corpus – Application for – Extradition –*
F *Order of committal – Appeal against – Detention of appellant pending issuance of extradition order – Whether lawful – Appellant allegedly a fugitive criminal required to attend hearing in United States of America (US) – Whether offences allegedly committed by appellant extraterritorial offences in US but not in Malaysia – Whether there was corresponding offence in Malaysia which has extraterritorial*
G *effect – Dual criminality requirements under s. 6(2) and s. 20(1) of Extradition Act 1992 – Whether complied with – Effect approach and continuing approach – Whether only rationalises jurisdiction of requesting state – Whether changes an extraterritorial offence to territorial offence – Whether requested state may refuse extradition when there is no corresponding extraterritorial jurisdiction – Whether*
H *offences allegedly committed by appellant had no extraterritorial application under s. 4 of Penal Code – Whether appellant could be extradited – Whether habeas corpus should be granted – Extra-Territorial Offences Act 1976, s. 2(1)*

This appeal concerned the legality of the detention of the appellant at the Sungai Buloh Prison pending the issuance of an order by the Minister of
I Home Affairs for extradition of the appellant to the United States of America ('US') under s. 20 of the Extradition Act 1992 ('Extradition Act'.) The appellant and his wife had come to Malaysia for a holiday on 1 October 2012

via tourist visa. On 5 October 2012, the US government requested the Malaysian government for an issuance of a provisional warrant against the appellant pursuant to art. 11 of the Extradition Treaty between the Malaysian Government and the US government which was signed on 3 August 1995. The appellant was wanted by the US government to stand trial in the US District Court for the District of Columbia in Washington DC for the following offences (a) count 1 : conspiracy to defraud the United States by dishonest means, in violation of Title 18, United States Code, s. 371; (b) count 2: smuggling in violation of Title 18, United States Code, s. 554 and Title 18, United States Code, s. 2; and (c) count 3: illegal export and attempted illegal exports, in violation of Title 22, United States Code, s. 2778(b)(2), Title 2, Code of Federal Regulations, s. 127(2) and Title 18 United States Code, s. 2.

Pursuant to s. 13(1)(b) of the Extradition Act, an order dated 5 October 2012 was made by the Magistrate for a warrant of apprehension of the appellant, which was duly executed against the appellant on 10 October 2012. The appellant was brought before the Magistrate Court on 11 October 2012 pursuant to s. 16(1) of the Extradition Act and the Magistrate made an order for the appellant to be detained at Sungai Buloh Prison for 60 days from the date of arrest. On 20 November 2012, the US government made a formal request for the extradition of the appellant to the Government of Malaysia with relevant documents ('extradition request'). In the extradition request, it was stated that the appellant was a fugitive criminal who was required to attend a hearing in the US pursuant to an arrest warrant issued on 16 November 2011 by the Magistrate Judge, US District Court for the District of Columbia on the said three counts. Under s. 16(2)(a) and (b) of the Extradition Act, the Magistrate issued an order for the case to be transmitted to the Sessions Court and for the extension of the appellant's remand pending his appearance before the Sessions Court.

On 11 December 2012, the Public Prosecutor ('the fourth respondent') filed a notice of application ('application') before the Sessions Court Kuala Lumpur for an order that the appellant be committed to prison pending the issuance of an order by the Minister for the extradition of the appellant to the US. For the purposes of the application, several charges were preferred by the Public Prosecutor to demonstrate the existence of corresponding offences which were, *inter alia*, that the appellant had intention to unlawfully export antennas without obtaining a permit issued under the Strategic Trade Act 2010 which was punishable under s. 9(4)(b)(i) of the same Act; made false statements in the airways bill the value of antennas exported to a company, Corezing International Pte Ltd, which was punishable under s. 199 of the Penal Code; making materially false, fictitious and fraudulent statement entries in shipping records including the airways bill, by undervaluing the items which was punishable under s. 417 of the Penal Code;

A forging certain documents, *to wit* airways bill as regards to the antennas intending that it shall be used for the purpose of cheating which was punishable under s. 468 of the Penal Code. To support the said application, the Deputy Public Prosecutor ('DPP') submitted that the appellant was sought by the US government to stand trial on the earlier mentioned three
B counts. Investigations showed that the appellant had conspired and had been involved in the smuggling and exporting of antennas. The appellant and several co-conspirators had allegedly arranged for the purchase and illegal exportation of 55 antennas from the US to Singapore and Hong Kong from a US company, Microwave Engineering Corporation ('MEC'). The appellant
C or any other individual or company involved in the transaction had not applied or received a licence from the US Department of State for the said exportation and the events that transpired were part of a conspiracy to avoid the scrutiny of the US government officials. On 4 September 2013, the Sessions Court committed the appellant to prison to await issuance of the
D Minister's order to surrender the appellant to the US. The Sessions Court was of the view that the courts in the US had local jurisdiction to try the appellant on counts 1 – 3, and therefore, there was no requirement to show the corresponding offences in Malaysia and punishable in Malaysia even if they were committed outside Malaysia.

E Against the order of committal, the appellant applied to the High Court, on 3 October 2013, for a writ of *habeas corpus* for his release. On 9 June 2014, the High Court dismissed the application. The High Court was satisfied that the appellant was a fugitive criminal and that the dual criminality pre-requisite under s. 6 of the Extradition Act and art. 2 of the Extradition Treaty
F was duly complied with. The High Court applied 'broad approach' or the 'conduct test' to conclude that there were corresponding offences under the Extradition Act. The High Court also applied the 'effect approach' to hold that although the appellant was not physically present in the US during the commission of counts 1 – 3, it was sufficient for committal purposes, that the offences were intentionally felt in the US.

G Before the Federal Court, the appellant's appeal essentially concerned a single issue of whether the dual criminality requirements under ss. 6(2) and 20(1)(c) of the Extradition Act consonant with art. 2 of the Extradition Treaty had been satisfied by the respondents to support the committal of the
H appellant under ss. 119, 417, 468 and 471 of the Penal Code. The appellant argued that the alleged extradition offences relied upon by the Sessions Judge to support the committal of the appellant were not extradition offences as the said offences had no extraterritorial application under s. 4 of the Penal Code or that under the Extra-Territorial Offences Act 1976 if the facts were transposed here in Malaysia.

I

Held (allowing appellant's appeal)
Per Raus Sharif PCA:

(1) The Sessions Court Judge was of the view that the offence under the Strategic Trades Act 2010 was not applicable as the alleged offences occurred prior to its enforcement. The Strategic Trade Act 2010 only came into force on 1 January 2011. The transaction which the appellant was alleged to have committed on the first to the third corresponding charges had actually occurred around 2006 to 2007, which was before the Strategic Trade Act 2010 (the corresponding Malaysian law) came into force. Thus, the dual criminality rule had not been satisfied for offences committed under the Strategic Trade Act 2010. (para 23)

(2) The offences against the appellant *ie*, counts 1-3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export. Counts 1-3 were extraterritorial offences. Hence, to satisfy the dual criminality requirement, the corresponding offences in Malaysia had to be extraterritorial offences in Malaysia. The dual criminality rule required extraterritoriality to extraterritoriality. That standpoint is reflected in the Treaty between Malaysian and the US (art. 2(5)). (paras 30 & 31)

(3) In relation to extraterritorial offences, the Extra-Territorial Offences Act 1976 deals with 'certain offences under written laws committed in any place without and beyond the limits of Malaysia and on the high seas on board any ship or on any aircraft registered in Malaysia or otherwise as if they were committed in Malaysia.' Hence, our domestic law provides for the operation of our law beyond our territorial limits only to offences under the Official Secrets Act 1972, the Sedition Act 1948 and to offences under Chapters VI, VIA, and VIB of the Penal Code. Our law does not extend to other offences committed beyond our territorial limits, even if it was an offence committed in Malaysia. The law of a requesting state may provide for its jurisdiction differently. But in relation to the corresponding offence in Malaysia, we need to look at our law. If there was no corresponding offence in Malaysia, then requisition must be refused, regardless of whether the requesting state had local or extraterritorial jurisdiction. Thus, the key to unravel a requisition for the return of a criminal fugitive is the corresponding offence in Malaysia which must have extraterritorial effect. (paras 32 & 33)

(4) By an amendment to the Penal Code, the list of extra-territorial offences was extended to Chapters VI, VIA and VIB of the Penal Code (chapters on offences against the state, offences relating to terrorism and organised crime), if such act is done or such offence was committed in similar circumstances as stated in s. 2 of the Extradition Act. However, the list

of extra-territorial offences was not extended to Chapter V on criminal conspiracy. Thus, the dual criminality requirement had not been satisfied here as the preferred offences had no extraterritorial effect under the Penal Code. Counts 1 – 3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export, which were punishable under the Code and/or the Customs Act. Our laws do not provide for punishment of counts 1 – 3 committed outside our territory. They were extraterritorial offences in the US, but not in Malaysia. (para 34)

(5) The 'effect approach' and 'continuing approach' only rationalises the jurisdiction of the requesting state (*United States of America v. Frank Santo Cotroni*, refd). The 'effect approach' and 'continuing approach' will not change an extraterritorial offence to a territorial offence. Given that counts 1 – 3 of the indictment were extraterritorial offences, then the corresponding offences in Malaysia had to be extraterritorial offences. Here, the corresponding offences under the Penal Code had no extraterritorial effect as it did not fall under Chapter 4, thus the dual criminality rule had not been satisfied. The effect approach and continuing approach advanced by the DPP herein had no application. (paras 35, 42 & 43)

(6) Based on the conduct approach, the appellant herein could not be extradited as the preferred charges brought against him concerned offences committed abroad that does not have extra-territorial application in Malaysia. The appellant had never set foot on US soil. In order for the US courts to have jurisdiction to try the appellant for those alleged offences, the alleged offences of forgery and preparing false declaration by undervaluing the airways bills (as stated in the preferred Malaysian charges) must be allegedly done by the appellant himself in US and not by anyone or anywhere else outside its territorial jurisdiction. (para 60)

(7) From the documentary evidence, it could be inferred that the alleged false declaration and forgery by way of air way bills for the purchase of the 2010 Cavity Black Spiral Antennas and the 3120 Biconical Antennas from a company, Microwave Engineering Corporation by Antennas & Components Ltd based in Massachusetts US for Corezing International was not made in the US but rather was allegedly made in Singapore by agents of Corezing International Pte Ltd, namely one Hia and one Lim. Thus, the appellant could not be deemed as an alleged conspirator in relation to the Penal Code offences stated in the preferred charges. There was no evidence provided in the supporting documents *vis-a-vis* affidavit of Agent David Parker to show that the appellant was ever involved in any alleged arrangement of conspiracy made between Corezing International Pte Ltd and Antennas & Components to export the said

antennas to Singapore without a licence either *via* undervaluing the airway bills or modifying the frequencies of the said antennas. (paras 61-63)

(8) The appellant in this case could not be extradited for the charges preferred against him especially when the corresponding offences stated in the charges were offences *with no extra territorial application under s. 4 of the Penal Code vis-a-vis* they were not extraditable offences. Both the Sessions Court and the High Court had misapplied the facts and the applicable laws on their finding on the issue of dual criminality. The dual criminality requirement as provided under the Extradition Act and the Extradition Treaty were not complied with in respect of the preferred offences advanced by the respondents. Thus, the writ of *habeas corpus* was granted. (paras 64 & 65)

Per Jeffrey Tan FCJ (concurring):

(1) The litmus test is the corresponding offence in Malaysia, from the aspect of the alleged criminal conduct and the jurisdiction to punish. The jurisdiction of the requesting state is relevant where there is a corresponding offence in Malaysia. But otherwise, it will not serve any purpose to delve into the jurisdiction of the requesting state, in the absence of a corresponding offence in Malaysia. The authorities cited on the 'effect approach' as well as the 'continuing approach' to show the jurisdiction of the requesting state, were not helpful at all to resolve the issue of the corresponding offences in Malaysia. (para 81)

(2) Article 2(5) of the Treaty provides that where there is no corresponding extraterritorial jurisdiction, the requested state may refuse extradition. Further, under the Extradition Act, an extradition offence is subject to the proviso that "in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia." In the light of art. 2(5) and said proviso, it was so clear that extradition offences had not been made out. (para 91)

Bahasa Malaysia *Translation Of Headnotes*

Rayuan ini berkenaan kesahihan penahanan perayu di Penjara Sungai Buloh sementara menunggu pengeluaran perintah oleh Menteri Dalam Negeri untuk mengekstradisi perayu ke Amerika Syarikat ('AS') di bawah s. 20 Akta Ekstradisi 1992 ('Akta Ekstradisi'). Perayu dan isterinya telah datang ke Malaysia untuk bercuti pada 1 Oktober 2012 melalui visa pelancong. Pada 5 Oktober 2012, Kerajaan AS telah meminta Kerajaan Malaysia untuk pengeluaran waran sementara terhadap perayu menurut per. 11 Perjanjian Ekstradisi antara Kerajaan Malaysia dan Kerajaan AS yang telah ditandatangani pada 3 Ogos 1995. Perayu dikehendaki oleh Kerajaan AS untuk dibicarakan di Mahkamah Daerah AS untuk Daerah Columbia di

Washington DC untuk beberapa kesalahan iaitu (i) pertuduhan pertama: konspirasi untuk menipu AS dengan cara yang tidak jujur, melanggar Title 18, United States Code, s. 371; (ii) pertuduhan kedua: penyeludupan masuk, melanggar Title 18, United States Code, s. 554 dan Title 18, United States Code, s. 2 dan (iii) pertuduhan ketiga: eksport haram dan cubaan eksport haram, melanggar Title 22, United States Code, s. 2778(b)(2) Title 2 Code of Federal Regulations, s. 127(2) dan Title 18 United States Code, s. 2

Menurut s. 13(1)(b) Akta Ekstradisi, satu perintah bertarikh 5 Oktober 2012 telah dibuat oleh Majistret untuk waran penangkapan perayu, yang telah dilaksanakan dengan sewajarnya terhadap perayu pada 10 Oktober 2012. Perayu telah dibawa ke Mahkamah Majistret pada 11 Oktober 2012 di bawah s. 16(1) Akta Ekstradisi dan Majistret membuat perintah untuk perayu ditahan di Penjara Sungai Buloh selama 60 hari dari tarikh tangkap. Pada 20 November 2012, Kerajaan AS membuat permintaan rasmi untuk mengekstradisi perayu kepada Kerajaan Malaysia dengan dokumen-dokumen relevan (permintaan ekstradisi). Dalam permintaan ekstradisi, telah dinyatakan bahawa perayu adalah penjenayah buruan yang perlu hadir di satu perbicaraan di AS menurut waran penangkapan yang telah dikeluarkan pada 16 November 2011 oleh Hakim Majistret, Mahkamah Daerah AS untuk Daerah Columbia atas ketiga-tiga pertuduhan tersebut. Di bawah s.16(2)(a) dan (b) Akta Ekstradisi, Majistret telah mengeluarkan perintah supaya kes dihantar ke Mahkamah Sesyen dan untuk lanjutan reman perayu sementara menunggu kehadirannya di Mahkamah Sesyen.

Pada 11 Disember 2012, Pendakwa Raya ('responden keempat') memfailkan notis permohonan ('permohonan') di Mahkamah Sesyen Kuala Lumpur untuk perintah bahawa perayu dikomit ke penjara sementara menunggu pengeluaran perintah oleh Menteri untuk mengekstradisi perayu ke AS. Bagi tujuan permohonan, beberapa pertuduhan telah dikenakan oleh Pendakwa Raya bagi menunjukkan kewujudan kesalahan berpadanan iaitu, antara lain, bahawa perayu mempunyai niat untuk menyalahi undang-undang mengeksport antena tanpa memperolehi permit yang dikeluarkan di bawah Akta Perdagangan Strategik 2010 yang boleh dihukum di bawah s. 9(4)(b)(i) Akta yang sama; telah membuat kenyataan palsu dalam bil laluan udara nilai antena yang dieksportkan ke sebuah syarikat, Corezing International Pte Ltd, yang boleh dihukum di bawah s. 199 Kanun Keseksaan; menyertakan kenyataan yang palsu, yang direkakan dan mengandungi penipuan dalam rekod-rekod penghantaran termasuk bil laluan udara dengan mengurangkan nilai item-item yang boleh dihukum di bawah s. 417 Kanun Keseksaan; memalsukan dokumen-dokumen tertentu iaitu bil laluan udara berhubungan antena-antena dengan niat bahawa ia boleh digunakan untuk penipuan yang boleh dihukum di bawah s.468 Kanun Keseksaan. Untuk menyokong permohonan tersebut, Timbalan Pendakwa Raya ('TPR') menghujahkan bahawa perayu dituntut oleh Kerajaan AS untuk dibicarakan ke atas ketiga-tiga pertuduhan yang telah disebut sebelum ini. Siasatan menunjukkan

bahawa perayu telah berkomplot dan terlibat dalam penyeludupan dan pengeksportan antena. Perayu dan beberapa konspirator telah menguruskan pembelian dan pengeksportan haram 55 antena dari AS ke Singapura dan Hong Kong daripada sebuah syarikat AS, Microwave Engineering Corporation ('MEC'). Perayu atau mana-mana individu atau syarikat lain yang terlibat dalam transaksi tersebut tidak memohon atau menerima lesen daripada Jabatan Negara Amerika Syarikat untuk pengeksportan tersebut dan peristiwa-peristiwa yang berlaku adalah sebahagian daripada konspirasi untuk mengelakkan penelitian pegawai-pegawai Kerajaan AS. Pada 4 September 2013, Mahkamah Sesyen telah mengkomitkan perayu ke penjara sementara menunggu pengeluaran perintah Menteri untuk menyerahkan perayu ke AS. Mahkamah Sesyen berpendapat bahawa mahkamah-mahkamah di AS mempunyai bidang kuasa tempatan untuk membicarakan perayu atas pertuduhan 1 – 3, dan oleh itu, tiada keperluan untuk menunjukkan terdapat kesalahan berpadanan di Malaysia dan boleh dihukum di Malaysia walaupun ia telah dilakukan di luar Malaysia.

Terhadap perintah pengkomitan, perayu memohon ke Mahkamah Tinggi, pada 3 Oktober 2013, untuk writ *habeas corpus* bagi pembebasannya. Pada 9 Jun 2014, Mahkamah Tinggi menolak permohonan tersebut. Mahkamah Tinggi berpuas hati bahawa perayu adalah seorang penjenayah yang diburu dan pra-syarat dwi kejenayahan di bawah s. 6 Akta Ekstradisi dan per. 2 Perjanjian Ekstradisi telah dipatuhi dengan sewajarnya. Mahkamah Tinggi telah mengguna pakai 'broad approach' atau 'conduct test' untuk membuat kesimpulan bahawa terdapat kesalahan berpadanan di bawah Akta Ekstradisi. Mahkamah Tinggi juga mengguna pakai 'effect approach' untuk memutuskan walaupun perayu tidak hadir secara fizikal di AS semasa perlakuan pertuduhan 1 – 3, ia adalah memadai untuk tujuan komital, bahawa kesalahan-kesalahan dapat dirasai di AS.

Di hadapan Mahkamah Persekutuan, rayuan perayu pada dasarnya adalah berkaitan dengan isu sama ada keperluan dwi kejenayahan di bawah s. 6(2) dan s. 20(1)(c) Akta Ekstradisi konsonan dengan per. 2 Perjanjian Ekstradisi telah dipenuhi oleh responden-responden bagi menyokong pengkomitan perayu di bawah ss. 119, 417, 468 dan 471 Kanun Keseksaan. Perayu menghujahkan bahawa kesalahan ekstradisi yang dirujuk oleh Hakim Sesyen untuk menyokong pengkomitan perayu bukan kesalahan-kesalahan ekstradisi kerana kesalahan-kesalahan tersebut tidak mempunyai pemakaian luar negeri di bawah s. 4 Kanun Keseksaan atau di bawah Akta Kesalahan-Kesalahan di Luar Negeri 1976 jika fakta-fakta dipindahkan di Malaysia.

Diputuskan (membenarkan rayuan perayu)
Oleh Raus Sharif PMR:

(1) Hakim Mahkamah Sesyen berpendapat bahawa kesalahan di bawah Akta Perdagangan Strategik 2010 tidak diguna pakai kerana kesalahan-kesalahan yang didakwa itu berlaku sebelum penguatkuasaannya. Akta Perdagangan Strategik 2010 hanya berkuatkuasa pada 1 Januari 2011.

Transaksi yang didakwa telah dilakukan oleh perayu berkenaan pertuduhan 1 – 3 telah dilakukan pada tahun 2006 dan 2007, iaitu sebelum Akta Perdagangan Strategik 2010 (undang-undang Malaysia berpadanan) berkuatkuasa. Oleh itu, peraturan dwi kejenayahan tidak dipatuhi untuk kesalahan-kesalahan yang dilakukan di bawah Akta Perdagangan Strategik 2010.

(2) Kesalahan yang dipertuduh terhadap perayu iaitu pertuduhan 1 – 3, yang telah dilakukan di luar AS, berhubung kesalahan-kesalahan konspirasi untuk menipu, penyeludupan dan eksport haram. Pertuduhan 1 – 3 adalah kesalahan di luar negeri. Oleh itu, untuk memenuhi keperluan dwi kejenayahan, kesalahan-kesalahan berpadanan di Malaysia harus juga kesalahan-kesalahan di luar negeri di Malaysia. Peraturan dwi kejenayahan memerlukan luar negeri ke luar negeri. Sudut pandangan itu dicerminkan dalam perjanjian antara Malaysia dan AS (per. 2(5)).

(3) Berhubungan dengan kesalahan-kesalahan luar negeri, Akta Kesalahan-Kesalahan di Luar Negeri 1976 berurusan dengan 'kesalahan-kesalahan di bawah undang-undang bertulis dilakukan di mana-mana tempat tanpa dan melebihi had Malaysia di laut lepas dalam mana-mana kapal atau dalam mana-mana kapal udara yang didaftarkan di Malaysia atau sebaliknya seolah-olah perbuatan atau kesalahan itu dilakukan di Malaysia.' Oleh itu, undang-undang tempatan memperuntukkan bagi operasi undang-undang hanya ke atas kesalahan-kesalahan di bawah Akta Rahsia Rasmi 1972, Akta Hasutan 1948 dan ke atas kesalahan-kesalahan di bawah Bab VI, VIA dan VIB Kanun Keseksaan. Undang-undang di sini tidak meliputi kesalahan-kesalahan lain yang dilakukan di luar had negeri ini, walaupun ia satu kesalahan yang dilakukan di Malaysia. Undang-undang sebuah negara peminta boleh memperuntukkan bidang kuasa yang berbeza. Tetapi berhubung kesalahan berpadanan di Malaysia, kita perlu melihat undang-undang kita. Jika tiada kesalahan berpadanan di Malaysia, maka permintaan mesti ditolak, tidak kira sama ada negara peminta mempunyai bidang kuasa tempatan atau luar negeri. Oleh itu, kunci penyelesaian sesuatu permintaan untuk penyerahan seorang pelarian jenayah adalah kesalahan berpadanan di Malaysia yang mempunyai kesan luar negeri.

(4) Melalui pindaan kepada Kanun Keseksaan, senarai kesalahan di luar negeri telah diperluaskan kepada Bab VI, VIA dan VIB Kanun Keseksaan (bab-bab atas kesalahan terhadap negara, kesalahan berhubungan dengan keganasan dan jenayah terancang), jika tindakan itu dilakukan atau tindakan sebegitu dilakukan dalam keadaan yang sama seperti yang dinyatakan dalam s. 2 Akta Ekstradisi. Walau bagaimanapun, senarai kesalahan-kesalahan luar negeri tidak diperluaskan ke Bab V iaitu konspirasi jenayah. Oleh itu, keperluan dwi kejenayahan tidak dipatuhi di sini kerana kesalahan-kesalahan yang dipertuduhkan tidak mempunyai kesan luar negeri di bawah Kanun

Keseksaan. Pertuduhan 1 – 3, yang telah dilakukan di luar AS, adalah berhubungan dengan kesalahan-kesalahan konspirasi penipuan, penyeludupan dan eksport haram, yang boleh dihukum di bawah Kanun dan/atau Akta Kastam. Undang-undang di sini tidak memperuntukkan hukuman terhadap pertuduhan 1 – 3 yang dilakukan di luar negeri kami. Kesalahan-kesalahan tersebut adalah kesalahan di luar negara di AS, tetapi bukan di Malaysia.

(5) 'Effect approach' dan 'continuing approach' hanya merasionalisasikan bidang kuasa negara peminta (*United States of America v. Frank Santo Cotroni*, dirujuk). 'Effect approach' dan 'continuing approach' tidak akan mengubah kesalahan luar negara ke kesalahan dalam negeri. Memandangkan pertuduhan 1 – 3 daripada pendakwaan adalah kesalahan-kesalahan luar negeri, kesalahan berpadanan di Malaysia harus juga kesalahan-kesalahan luar negeri. Di sini, kesalahan berpadanan di bawah Kanun Keseksaan tidak mempunyai kesan luar negara kerana ia tidak terangkum dalam Bab 4, oleh itu peraturan dwi kejenayahan gagal dipatuhi. 'Effect approach' dan 'continuing approach' yang dikemukakan oleh TPR di sini tidak boleh diguna pakai.

(6) Berdasarkan 'conduct approach', perayu tidak boleh diekstradisi kerana kesalahan-kesalahan yang dipertuduhkan terhadapnya berhubungan dengan kesalahan-kesalahan yang dilakukan di luar negara yang tidak diguna pakai di Malaysia. Perayu tidak pernah menjejak kaki di bumi AS. Untuk mahkamah-mahkamah AS mempunyai bidang kuasa untuk membicarakan perayu berkenaan kesalahan-kesalahan yang didakwa terhadapnya, kesalahan-kesalahan yang didakwa berkenaan pemalsuan dan penyediaan kenyataan palsu dengan rendahkan nilai bil laluan udara (seperti yang dinyatakan dalam pertuduhan Malaysia) sepatutnya dilakukan oleh perayu sendiri di AS dan bukan oleh sesiapa atau di mana sahaja di luar bidang kuasa negerinya.

(7) Berdasarkan keterangan dokumentar, mungkin dibuat kesimpulan bahawa kenyataan palsu dan pemalsuan bil laluan udara yang didakwa untuk pembelian 2010 Cavity Black Spiral Antennas dan 3120 Biconical Antennas daripada sebuah syarikat, Microwave Engineering Corporation oleh Antennas & Components Ltd yang ditempatkan di Massachusetts AS untuk Corezing International Pte Ltd tidak dilakukan di AS tetapi didakwa dilakukan di Singapura oleh ejen-ejen Corezing International, iaitu satu Hia dan satu Lim. Oleh itu, perayu tidak boleh dianggap sebagai seorang pengkomplot berhubung kesalahan-kesalahan di bawah Kanun Keseksaan yang dinyatakan dalam pertuduhan-pertuduhan yang dikenakan. Tiada keterangan yang diperuntukkan dalam dokumen-dokumen sokongan *vis-a-vis* afidavit daripada Ejen David Parker untuk menunjukkan bahawa perayu terlibat dalam mana-mana pengaturan konspirasi yang dibuat di antara Corezing International Pte Ltd dan Antennas & Components untuk mengeksport

A antena-antena tersebut ke Singapura tanpa lesen sama ada dengan menilai kurang bil laluan udara atau dengan meminda frekuensi antenna-antenna tersebut.

(8) Perayu dalam kes ini tidak boleh diekstradisi untuk pertuduhan-pertuduhan yang dikenakan terhadapnya terutamanya apabila kesalahan yang berpadanan yang dinyatakan dalam pertuduhan adalah kesalahan yang tidak mempunyai pemakaian luar negeri di bawah s. 4 Kanun Keseksaan *vis-a-vis* ia bukan kesalahan boleh ekstradisi. Kedua-dua Mahkamah Sesyen dan Mahkamah Tinggi telah tersalah guna fakta-fakta dan undang-undang ke atas dapatan-dapatan mereka berkenaan isu dwi kejenayahan. Keperluan dwi kejenayahan yang diperuntukkan di bawah Akta Ekstradisi dan Perjanjian Ekstradisi tidak dipatuhi berkenaan kesalahan-kesalahan yang didakwa oleh responden-responden. Oleh itu, writ *habeas corpus* telah diberikan.

Oleh Jeffrey Tan HMP (menyetujui):

(1) Ujian litmus adalah kesalahan berpadanan di Malaysia, dari segi kelakuan jenayah yang dikatakan itu dan bidang kuasa untuk menghukum. Bidang kuasa negara peminta adalah relevan di mana terdapat kesalahan berpadanan di Malaysia. Tetapi ia tidak akan mempunyai sebarang kegunaan untuk menyelidiki bidang kuasa negara peminta, dalam ketiadaan kesalahan berpadanan di Malaysia. Autoriti-autoriti yang dirujuk berkenaan 'pendekatan efek' dan juga 'pendekatan bersambung' untuk menunjukkan bidang kuasa negara peminta, tidak menolong langsung untuk menyelesaikan isu kesalahan berpadanan di Malaysia.

(2) Perkara 2(5) Perjanjian memperuntukkan di mana tiada bidang kuasa luar negeri berpadanan, negara diminta boleh menolak ekstradisi. Selanjutnya, di bawah Akta Ekstradisi, kesalahan ekstradisi adalah tertakluk kepada syarat bahawa 'dalam kes kesalahan luar negeri, ia boleh dihukum di bawah undang-undang Malaysia jika ia dilakukan dalam hal keadaan yang berpadanan di luar Malaysia.' Mengambil kira per. 2(5) dan peruntukan tersebut, adalah jelas bahawa kesalahan-kesalahan ekstradisi tidak terbukti.

Case(s) referred to:

Ajay Agarwal v. Union of India AIR 1993 SC 1637 ***(refd)***
Mauro v. Government of the United States of America [2009] EWHC 150 ***(refd)***
Mobarik Ali Ahmed v. The State of Bombay (S) AIR 1957 SC 857 ***(refd)***
Norris v. Government USA (2008) AHER 1103 ***(refd)***
Norris v. Government of the United States of America 2 All ER 1103 ***(refd)***
Office of the King's Prosecutor, Brussels v. Cando Armas and Another [2004] All ER 115 ***(refd)***
Office of the King's Prosecutor, Brussels v. Cando Armas And Another [2006] 2 AC 1; [2006] 1 All ER 647 ***(refd)***
Onwuzulike v. United States of America [2009] EWHC 1395 ***(refd)***

PP v. Lin Chien Pang Aka "Teacher Lin" "Saenwoo Asue" [1993] 2 CLJ 225 HC ***(refd)***
PP v. Loh Ah Hoo [1974] 1 LNS 121 HC ***(refd)***
PP v. Rajappan Chinna Kounder [1986] 1 CLJ 175 SC ***(refd)***
PP v. Sajad Farhadi (Criminal Application No 44-217-12/2012) ***(not foll)***
PP v. Taw Cheng Kong [1998] 2 SLR (R) 489 ***(refd)***
R v. Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3) [2000] AC 147 ***(refd)***
Re Nielsen [1984] AC 606 ***(refd)***
Re Nielsen [1994] AC 606 ***(refd)***
Regina (Al-Fawwaz) v. Governor of Brixton prison [2002] 1 AC 556 ***(refd)***
Strassheim v. Daily 221 US 280 (1911) ***(refd)***
United States of America v. Cotroni [1989] 1 RCS 1469 ***(refd)***
United States of America v. Lépine [1994] 1 SCR 286 ***(refd)***
Vincenzo Melia v. United States of America and William F. Smith, Attorney General 667 ***(refd)***
Vincenzo Melia v. United States of America 667 F2d 300 1981 F 2d 300 ***(refd)***
Wong Yuh Lan v. PP [2012] 4 SLR 845 ***(refd)***

Legislation referred to:
Extra-Territorial Act Offences 1976, s. 2(1)
Extradition Act 1992, ss. 6(2)(b), 13(1)(b), 16(1), (2)(a), (b), 20(1)(c)
Penal Code, ss. 4, 109, 119, 120A, 417, 468, 471, 494

Criminal Code [Can], s. 423(1)(a)
Criminal Procedure Code [Ind], s. 188(a)
Extradition Act 2000 [Sing], ss. 9(1)(a), 10(1)(a), 11(7)
Extradition Act 2003 [UK], s. 65(3)
Penal Code [Sing], ss. 108B, 109

Other source(s) referred to:
M Cherif Bassiouni, *International Extradition, United States Law and Practice*, 6th edn, p 502

For the appellant - Muhammad Shafee Abdullah (Al-Firdaus Shahrul Naing, Kevin Tan Kim Kwong & Syed Ismat Syed Muhamad with him); M/s Shafee & Co
For the respondents - Mohd Abazafree Mohd Abas (Nadia Hanim Mohd Tajuddin, Nazran Mohd Sham, Abu Bakar Mohd Fuad & Faizul Aswad Masri); DPPs

[Appeal from High Court, Kuala Lumpur; Criminal Application No: 44-106-10-2013]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif PCA:

Introduction

[1] This appeal concerned the legality of the detention of the appellant at the Sungai Buloh Prison pending the issuance of an order by the Minister of Home Affairs (Minister) for extradition of the appellant to the United States of America (US) under s. 20 of the Extradition Act 1992 (Extradition Act).

[2] The appellant had on 11 October 2013 filed a notice of motion (motion) in the High Court for a writ of *habeas corpus* in aid of *certiorari* to quash the committal order of the Sessions Court dated 4 September 2013. The motion was dismissed by the High Court on 9 June 2014. Hence, this appeal.

[3] We heard the appeal on the 7 October 2014 and 11 November 2014 and unanimously allowed the same. An order for *habeas corpus* was issued and the appellant was ordered to be released. We now give our reasons.

Background Facts

[4] The background facts leading to this appeal are these. The appellant and his wife, Maryam Taefeh Rostami came to Malaysia for a holiday on 1 October 2012 *via* tourist visa for the purpose of visiting Penang, Langkawi and Kuala Lumpur for about two weeks. They were scheduled to return to Iran on 14 October 2012.

[5] On 5 October 2012, the US government requested the Malaysian government for an issuance of a provisional warrant against the appellant pursuant to art. 11 of the Extradition Treaty between Malaysian government and the US government which was signed on 3 August 1995. The appellant was wanted by the US government to stand trial in the US District Court for the District of Columbia, in Washington, DC for the following offences:

(a) Count 1: Conspiracy to defraud the United States by dishonest means, in violation of Title 18, United States Code, s. 371, and punishable by imprisonment for a maximum of five years;

(b) Count 2: Smuggling in violation of Title 18, United States Code, s. 554 and Title 18, United States Code, s. 2, and punishable by imprisonment for a maximum of ten years; and

(c) Count 3: Illegal Export and Attempted Illegal Exports, in violation of Title 22, United States Code, s. 2778(b)(2), Title 2, Code of Federal Regulations, ss. 127.2, and Title 18, United States Code, s. 2 and punishable by imprisonment for a maximum of twenty years.

[6] Pursuant to s. 13(1)(b) of the Extradition Act, an order dated 5 October 2012 was made by the Magistrate for a warrant of apprehension of the appellant. It was duly executed against the appellant on 10 October 2012.

[7] On 11 October 2012, the appellant was brought before the Magistrate Court in Kuala Lumpur pursuant to s. 16(1) of the Extradition Act and the Magistrate made an order for the appellant to be detained at Sungai Buloh Prison for 60 days from the date of arrest. On 20 November 2012 the US government made a formal request for the extradition of the appellant to the Government of Malaysia, supported with relevant documents (extradition

request). In the extradition request, it is stated that the appellant is a fugitive criminal who is required to attend a hearing in the US pursuant to an arrest warrant issued on 16 November 2011 by the Magistrate Judge, US District Court for the District of Columbia on three counts.

[8] Upon receipt of the extradition request, the Minister of Home Affairs issued an order to signify to the Magistrate that such request has been made. After receiving the said order, the Magistrate issued an order under s. 16(2)(a) and (b) of the Extradition Act for the case to be transmitted to the Sessions Court and for the extension of the appellant's remand pending his appearance before the Sessions Court.

At The Sessions Court

[9] On 11 December 2012, the public prosecutor (fourth respondent) filed a notice of application (application) before the Sessions Court Kuala Lumpur for an order that the appellant be committed to prison pending the issuance of an order by the Minister for the extradition of the appellant to the US.

[10] For the purposes of the application, seven charges were preferred by the public prosecutor to demonstrate the existence of corresponding offences which can be summarised as follows:

1st Charge

On or about 22 September 2006 and 24 September 2007 with the intent to unlawfully export without obtaining a permit issued under the Strategic Trade Act 2010 which is punishable under section 9(4)(b)(i) of the Act

2nd Charge

On or about 25 July 2007 to 24 September 2007 with the intent to unlawfully export 2010-1 Cavity Black Spiral Antenna without obtaining a permit issued under the Strategic Trade Act 2010 which is punishable under section 9(4)(b)(i) of the Act

3rd Charge

On or about 25 July 2007 to 24 September 2007 with the intent to unlawfully export 3120 Biconical Antenna without obtaining a permit issued under the Strategic Trade Act 2010 which is punishable under section 9(4)(b)(i) of the Act.

4th Charge

Between 25 July 2007 to 24 September 2007 making false statement in the air waybills the value of antennas exported to Corezing which is punishable under section 199 of the Penal Code.

A 5th Charge

Between 25 July 2007 to 24 September 2007 making materially false, fictitious and fraudulent statement entries in shipping records including the air waybills, by undervaluing the items which is punishable under section 417 of the Penal Code.

B 6th Charge

Between 25 July 2007 to 24 September 2007 forged a certain document *to wit* air waybills as regards to 2010-1 Cavity Black Spiral Antenna, intending that it shall be used for the purpose of cheating which is punishable under section 468 of the Penal Code;

C Or (Alternative)

Between 25 July 2007 to 24 September 2007 used as genuine a certain document *to wit* air waybills as regards to 2010-1 Cavity Black Spiral Antenna, which you knew at the time you used it, to be forged document, which is punishable under section 471 of the Penal Code.

D 7th Charge

Between 25 July 2007 to 24 September 2007 forged a certain document *to wit* air waybills as regards to 3120 Biconocal Antenna, intending it shall be used for the purpose of cheating which is punishable under section 468 of the Penal Code;

E Or (Alternative)

Between 25 July 2007 to 24 September 2007 used as genuine a certain document *to wit* air waybills as regards to 3120 Biconical Antenna, which you knew at the time you used it, to be forged document, which is punishable under section 471 of the Penal Code

F **[11]** The following facts (now summarised) were presented by the deputy public prosecutor (DPP) to support the said application:

(a) the appellant was sought by the US government to stand trial on the earlier mentioned three counts.

G (b) under powers enabling, the President of the US had imposed economic sanctions on certain foreign countries, on the ground of national security, foreign policy of the economy of the US. The President of the US had declared a national emergency to counter the threat. Orders and regulations had been issued to prohibit and govern certain transactions with US persons involving US origin goods.

H (c) Executive Order No. 12959 prohibited, *inter alia*, "the exportation, re-exportation, sale or supply, directly or indirectly, to Iran of any goods, technology, or services from the US or by a US person." The Iranian Threat Reduction (ITR) was formed by the Secretary of the Treasury to enforce the Executive Order.

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(d) ITR prohibited, *inter alia*, "the exportation, re-exportation, sale or supply, directly or indirectly, to Iran of any goods, technology, or services from the US or by a US person, wherever located, to Iran or the Government of Iran, without prior authorisation or licence from the US Department of Treasury, through the Office of Foreign Assets Control in the District of Columbia. The definition of transactions also included "transactions that's evaded or avoided or had the purpose of evading or avoiding any of the prohibitions contained in the ITR, including the unauthorised exportation of goods from the US to a third country if the goods were destined or intended for Iran".

(e) joint investigation between Federal Bureau of Investigation ("FBI"), USA Department of Commerce, Office of Export Enforcement and USA Department of Homeland Security, Homeland Security Investigations, ("HIS") showed that the appellant had conspired and has been involved in the smuggling and exporting of antenna which is listed as one of the defence articles from obtaining the required license or other approval.

(f) the appellant and the conspirators identified as Lim Kow Seng ("Eric Lim/James Wong") and Hia Soo Gan Bensen (Benson Hia/Thomas Yan) both Singapore citizens, together with Eric Schneider and Rudy Cheung who are American citizens, had arranged for the purchase and illegal exportation of the 55 antennas from the US to Singapore and Hong Kong from a US company known as Microwave Engineering Corporation ("MEC").

(g) MEC was a well-known manufacturer for antennas suitable for military applications. MEC manufactured Cavity-Backed Spiral 2010-1 ("2010-1 antenna"), which is light weight, and compact size, suitable for airborne ship direction finding system or radar receiver. The 2010-1 antennas would not be exported without licence from the US Department of State's Directorate of Defence Trade Controls (DDTC).

(h) MEC also manufactured Biconical Antenna type 3120 ("3120 antenna"), an omnidirectional antenna suitable for airborne and ship environment and for some military aircraft. 3120 antenna, with a modified frequency, was a defence article. A licence was required from the DDTC for it to be exported from the US.

(i) investigation of an invoice dated 17 January 2007 revealed that on and about December 2006, the appellant asked one Mohsen Nik to obtain 50 units of 2010-1 antenna from MEC. In about January 2007, Mohamad Akhavan Nik otherwise known as Hamed Nik from a United Kingdom company named Vonero Ltd. contacted MEC staff *via* telephone to discuss the purchase of the 2010-1 antenna. Pursuant to the telephone conversation, he had sent an email to MEC to request a quote for 2010-1 antenna in quantities of 50 and 85 units.

A (j) prior to that, on 25 December 2006, the appellant sent an email to Conspirator F, a resident and citizen of Iran *via* an email account aminicmarketiran.com requesting Conspirator F to obtain a quote from the MEC on 45 units and 5 units 2010-1 antenna and 3120 antenna respectively.

B (k) around November 2006, appellant requested Lim Kow Seng, his former colleague and co-worker in Singapore at Corezing International Company, to get the 2010-1 and 3120 antenna from MEC. Attempts to get the antennas were successful. However, Lim Kow Seng failed to ship those antennas out, as MEC required an export licence to export.

C (l) at a meeting between an employee of MEC, Rudy Cheung (listed in the indictment as Conspirator B) and Eric Schneider, President of Antennas and Components Inch, it was agreed that Eric Schneider will contact MEC in disguise to request for 2010-1 antennas, to deceive the export control personnel from thinking that the transaction was the same
D transaction that had been once attempted by Lim Kow Seng. Eric Schneider and Rudy Cheung also agreed to change the antenna frequency range for the purpose of export to Lim Kow Seng and to avoid the transaction from being blocked by MEC export control staff. Lim Kow Seng agreed to buy an antenna 2010-1 (in disguise) from Eric Schneider,
E who had purchased it from MEC.

(m) the antennas were subsequently obtained. The antennas which were sold and exported from the US to Lim Kow Seng were sold and exported from the USA to Lim Kow Seng by five shipments *via* Singapore and
F Hong Kong, from July to September 2007. Eric Schneider made deliveries of the said antennas to Corezing International in Singapore and Hong Kong.

(n) the appellant or any other individual or company involved in the transaction had not applied or received a licence from the US
G Department of State or DDTC for the said exportation from the US to Singapore or Hong Kong.

(o) the events that transpired were part of a conspiracy to avoid the scrutiny of the US government officials. To this end, the appellant together with Eric Schneider, had reduced the value of the transmission antennas on
H the airway bills. The conspirators who were Singapore citizens had already been extradited to the US.

[12] On 4 September 2013, the Sessions Court committed the appellant to prison to await issuance of the Minister's order to surrender the appellant to the US. The Sessions Court held that the alleged corresponding offences,
I namely those under the Strategic Trade Act 2010, failed to meet the dual criminality requirement, as the alleged criminal acts occurred before the Strategic Trades Act 2010 came into force. But the Sessions Court held that

the dual criminality requirement pursuant to s. 6 of the Extradition Act and art. 2 of the Treaty was fulfilled with respect to the alleged corresponding offences 4-7 under the Penal Code. The Sessions Court was satisfied that based on the facts as presented, counts 1-3 were within the jurisdiction of the US Courts, specifically, the United States District Court for the District of Columbia. To impute dual criminality, the Sessions Court applied the cases of *Office of the King's Prosecutor, Brussels v. Cando Armas And Another* [2006] 2 AC 1, *Mobarik Ali Ahmed v. The State of Bombay* 1957 (s) AIR 857, 1958 SCR 328 and *Ajay Agarwal v. Union of India* AIR 1993 S0 1637. The Sessions Court was of the view that courts in the US had local jurisdiction to try the appellant on counts 1-3, and therefore there was no requirement to show the corresponding offences in Malaysia and punishable in Malaysia even if it were committed outside Malaysia.

At The High Court

[13] Against the order of committal, the appellant applied to the High Court, on 3 October 2013, for a writ of *habeas corpus* for his release. On 9 June 2014 the High Court dismissed the application. The High Court was satisfied that the appellant was a fugitive criminal and that the dual criminality pre-requisite under s. 6 of the Extradition Act and art. 2 of the Extradition Treaty was duly complied with. The High Court applied the "broad approach" or the "conduct test" as applied in *Re Nielsen* [1984] AC 606 and *Norris v. Government* USA [2008] AHER 1103 to conclude that there were corresponding offences under the Extradition Act. The High Court also applied the "effect approach" to hold that although the appellant was not physically present in the US during the commission of counts 1-3, it was sufficient for committal purposes, that the offences were intentionally felt in the US.

The reasoning of the High Court went along the following lines:

> 3. This court applies broad conduct approach or conduct test (*Re Nielsen* [1984] AC 606, *Norris v. Government USA* [2008] AHER 1103). The equivalent Malaysian Offence is also an offence in Malaysia Offences in US stated in paragraph B5(i, ii and iii). Applying broad approach or conduct test, there are recognised corresponding offences under the EA 1992.
>
> 4. The duty of the contracting state or the requested state i.e. Government of Malaysia is to furnish with a copy of the charge to ensure identification of the relevant corresponding Malaysian law so as to facilitate a determination of compliance with the double criminality rule. (see *PP v. Ottavio Quattrochi* [2003] 1 CLJ 557).
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> 5. The Applicant is a fugitive criminal or "an accused person". Section 5 of the EA 1992.

A 6. Though the Applicant was not physically in the US during the commission of the alleged offences, it is sufficient that the offences were intentionally felt in the US for committal purposes. (*Vicenzo Melia v. USA* 667 F.2d.3000; 1981, *USA v. Cotroni* [1989] 1 RCS 1469 as well as *Wong Yuh Lan v. PP* [2012] 4 SLR 845).

B 7. Hence I am of the view that the requirements of dual criminality rule are complied with. (See section 6 of the EA 1992 and Article 2 of the Extradition Treaty) (*PP v. Sajad Farhadi* no. 44-217-12/2012 does not apply in this particular case).

At The Federal Court

C **[14]** Before us, the appellant canvassed six grounds in support of his appeal as can be found in his petition of appeal. In evaluating the merits of this appeal, we found that this appeal essentially concerned a single issue of whether the dual criminality requirements under s. 6(2) and s. 20(1)(c) of the Extradition Act consonant with art. 2 of the Extradition Treaty has been D satisfied by the respondents to support the committal of the appellant under s. 119, s. 417, s. 468, and s. 471 of the Penal Code. The contention raised by counsel for the appellant was that the appellant could only be extradited if the alleged offences committed in the US are also offences here in Malaysia. Hence, according to him, the principle of dual criminality requires E that offences which are extraterritorial in the US must also be offences which are extraterritorial in Malaysia in order for the principle of dual-criminality to be satisfied to justify the appellant's extradition. This was the linchpin of the appellant's argument. Against this backdrop learned counsel for the appellant argued that the alleged extradition offences relied upon by the Sessions Court Judge to support the committal of the appellant were not F extradition offences as the said offences have no extraterritorial application under s. 4 of the Penal Code or that under the Extra-Territorial Offences Act 1976 if the facts were transposed here in Malaysia.

[15] The DPP who appeared for the respondents replied that the proviso G to s. 6(2) of the Extradition Act, and art. 2(5) of the Extradition Treaty, with respect to extraterritorial jurisdiction, were not applicable, as the alleged offences fell within the territorial jurisdiction of the US District Court for the District of Columbia by reason of the application of the "effect approach" (learned DPP cited *Office of The King's Prosecutor, Brussels v. Cando Armas and Another* [2006] 1 All ER 647; *Vincenzo Melia v. United States of America* 667 H F2d 300 1981; *United States of America v. Cotroni* [1989] 1 RCS 1469; *Onwuzulike v. United States of America* [2009] EWHC 1395 (admin Divisional Court), the "broad approach" (learned DPP cited *Re Nielsen* [1994] AC 606 which was followed in *Norris v. Government of the United States of America* 2 All ER 1103) and the "continuing approach" (learned DPP cited *PP v. Loh* I *Ah Hoo* [1974] 1 LNS 121; [1974] 2 MLJ 216; *Ajay Agarwal v. Union of India* AIR 1993 SC 1637; *Mobarik Ali Ahmed v. The State of Bombay (S)* AIR 1957 S.0 857).

[16] Before we delve further on the merits of this appeal, it is pertinent that we refer to the relevant provisions in relation to extradition proceedings:

Direction of the Minister to apply procedure in section 20

4. Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the *prima facie* requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in section 20 shall apply to such cases.

Interpretation

5. In this Act, unless the context otherwise requires:

"country" includes a territory of a country which, though not sovereign and independent, is authorised by that country to enter into extradition arrangements with other countries; "diplomatic representative" means a chief representative or consular officer, as defined in the Diplomatic and Consular Privileges Ordinance 1957 [Ord. 53 of 1957]*;

"extraditable offence" means an offence described in section 32

"extradition offence' means an offence described in subsection 6(2) or 6(3);

"fugitive criminal" means any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia;

"Magistrate" means a Magistrate of the First Class or a Sessions Court Judge;

"Minister" means the Minister of Home Affairs;

"prescribed" means prescribed by rules made under this Act;

"provisional warrant" means a warrant which is issued under paragraph 13 (1)(b);

"surrender warrant" means a warrant which is issued under paragraph 21(2)(b);

"temporary surrender warrant" means a warrant which is issued under paragraph 21(2)(a).

Extradition offence

6.(1) A fugitive criminal shall only be returned for an extradition offence.

(2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences:

(a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and

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(b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:

Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

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(3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

[17] Pertinent to note that in tandem with the extradition law of many C countries, s. 6(2)(b) of the Extradition Act provides that "an extradition offence is an offence, however described, including fiscal offences ... which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death".

D

[18] The definition of an extradition offence is subject to the following proviso as appears in s. 6(2)(b) which reads "provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia".

E

[19] Consonant with s. 6(2)(b) of the Extradition Act, s. 20(1)(c) of the Act provides that the Sessions Court shall commit the criminal fugitive to prison to await the order by the Minister for his surrender if the Sessions Court is satisfied, *inter alia*, "that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia".

F

[20] Under s. 20(1)(c) of the Extradition Act the Sessions Judge must first satisfy himself that the dual criminality requirement is fulfilled. This is very clear from the wordings employed under s. 20(1) which clearly spells out that "upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws G of Malaysia". Section 20(1) of the Extradition Act is worded as follows:

Procedure before Sessions Court where a special direction has been given under section 4

20. (1) Where a direction has been given by the Minister under section H 4, the Sessions Court shall:

(a) after hearing any representation made in support of the extradition request;

(b) upon the production of supporting documents in relation to the offence;

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(c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;

(d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that:

(i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;

(ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;

(iii) the offence is an offence under military law which is not also an offence under the general criminal law;

(iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;

(v) the fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;

(e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought, commit the fugitive criminal to prison to await the order by the Minister for his surrender.

(2) In the proceedings before the Sessions Court under subsection (1) the fugitive criminal is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict the allegation that the fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.

(3) In this section, "supporting documents" means:

(a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;

(b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;

(c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence.

[21] Apart from the above provisions under the Extradition Act, the relevant provisions of the Extradition Treaty between the Malaysian Government and the US Government is also relevant and is hereby reproduced as follows:

A Article 2(5)

> If the offence has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the requested state provide for punishment of an offence committed outside its territory in similar circumstances, and if the requirements of extradition under treaty
B are otherwise met. If the laws of the requested state do not so provide the executive authority of the requested state may, in its discretion, deny extradition.

[22] Now, reverting to the specifics of the instant case, as stated earlier the Sessions Judge had issued the committal order dated 4 September 2013
C against the appellant pending the Minister's Order for his extradition to the US for the preferred offence under the Penal Code. The Sessions Judge was of the view that the offence under the Strategic Trade Act 2010 is not applicable as the alleged offences occurred prior to its enforcement. It is not in dispute that the Strategic Trade Act 2010 only came into force on
D 1 January 2011.

[23] We are in agreement with the findings of the Sessions Judge on this point. It is not in dispute that the transaction which the appellant was alleged to have committed in the first to the third corresponding charges had actually occurred between 22 September 2006 to 24 September 2007; between
E 25 July 2007 to 24 September 2007 and between 27 July 2007 to 24 September 2007. This was way before the Strategic Trade Act 2010 (the corresponding Malaysian law) came into force. Thus, to state the obvious, the dual criminally rule has not been satisfied for offences committed under the Strategic Trade Act 2010.

F **[24]** Now we come to the preferred charges for offences under the Penal Code ie the offence of making a false statement in a declaration that is admissible under s. 199 of the Penal Code, offence for cheating under s. 417 of the Penal Code, offence of abetting in pursuance of the conspiracy under s. 109 of the Penal Code read together with s. 120A of the Penal Code.

G **[25]** As we have highlighted earlier the principle of dual criminality requires that offences which are extraterritorial in the US must also be offences which are extraterritorial in Malaysia in order for the principle of dual-criminality to be satisfied to justify the appellant's extradition. Perhaps it would be opportune for us first to deal with the concept of dual criminality
H and what it entails as a legal mechanism of some consequences.

[26] Dual criminality in the context of extradition requires that a person be extradited if there is evidence that would justify his apprehension had the act or omission constituting the offence been committed in the state to which the extradition request has been made ("the requested state"). In order to do
I this, the allegations of fact must be transposed. Lord Millett in *Regina (Al-Fawwaz) v. Governor of Brixton prison* [2002] 1 AC 556 explained the purpose of the requirement of double criminality in extradition in this manner:

> In considering this question it is important to bear the objects of the double criminality rule in mind, for its two requirements serve different purposes. The first requirement, that the offence for which extradition is ordered should be within the jurisdiction of the requesting state, serves a purely practical purpose. There is no point in extraditing a person for an offence for which the requesting state cannot try him. The second requirement, that the offence should also be within our own criminal jurisdiction, serves to protect the accused from the exercise of an exorbitant foreign jurisdiction. Views as to what constitutes an exorbitant jurisdiction naturally differ; the test adopted by our own law has been to accord to other countries the jurisdiction which we claim ourselves but no more. As my noble and learned friend Lord Rodger of Earlsferry has observed, this is not the only means of protection given by our system of extradition, for the exercise of an exorbitant foreign jurisdiction may be forestalled by executive action. But it is the only measure of judicial control which the law provides for this purpose.

[27] We share the same reasoning of the House of Lords in *Al-Fawwaz*'s case and we accept the same as the correct proposition of the law. Bearing that in mind, we now turn to the submissions of the parties on this issue. Counsel for the appellant submitted that the alleged offences preferred against the appellant are extraterritorial in the US, but however the US Courts have no jurisdiction to try the appellant as the dual criminality requirement has not been satisfied for the following reasons:

(a) the appellant had never set foot on the US soil and there was no evidence of such being advanced by the respondents, nor has he allegedly done any overt acts in the US concerning the preferred charges and alleged offences against him. The appellant's stance is that in absence of any alleged overt act done by the appellant personally in the US to that of the alleged co-conspirators ie Eric Lim and Benson Hia, it is clear that the alleged offences preferred against the appellant are not extraterritorial in Malaysia.

(b) the offences preferred against the appellant are not extraterritorial in Malaysia as they do not fall under the ambit of Chapter VI and Chapter VIA of the Penal Code to render it extraterritorial in application pursuant to s. 4 of the Penal Code as these offences clearly fall under Chapter XI, Chapter XVII and Chapter XVIII of the Penal Code.

[28] Learned DPP appearing on behalf of the respondents conversely submitted that the proviso in s. 6(2) of the Extradition Act and art. 2(5) of the Extradition Treaty in respect of extraterritorial jurisdiction are not applicable to this case because the charges upon which the appellant was charged falls within the territorial jurisdiction of the US District Court for the District of Columbia. To support his contention, learned DPP advocated the following approaches to be taken by this court in deciding whether the dual criminality requirement has been satisfied, namely:

A (a) the effect approach – that *albeit* the appellant was not physically present in the US it is sufficient for committal purposes that the offences were internationally felt in the US. Learned DPP argued that since the effect that resulted from the appellant's conduct was felt gravely by the US, that would give them jurisdiction over this matter, thus, it can be said
B to have occurred within their territory. Therefore the issue of extra-territoriality does not arise. Learned DPP cited the cases of *Office of the King's Prosecutor, Brussels v. Cando Armas And Another* [2006] 1 All ER 647; *Vincenzo Melia v. United States of America* 667 F.2d 300 1981; *United States of America v. Cotroni* [1989] 1 RCS 1469; 161 *Onwuzulike v. United*
C *States of America* [2009] EWHC 1395 (Admin) Divisional Court in support of his proposition.

(b) the broad conduct approach – In determining the dual criminality requirement, learned DPP urged this Honourable Court to adopt the "broad conduct approach" as postulated in the case of *Re Nielsen* [1994]
D AC 606 which was followed in the case of *Norris v. Government of the United States Of America* 2 All ER 1103. This approach required the court to look at the conduct alleged against the fugitive and to determine whether the conduct would have been criminal had it been committed within the jurisdiction of the requested state. This approach is a much
E preferred approach which is being adopted in many jurisdiction. Learned DPP highlighted that this approach facilitates extradition.

(c) the continuing approach – learned DPP also urged this court to adopt the "continuing act doctrine" where by deeming that an act that begins or occurs outside the territory of the requested state but which is
F completed within the territory of the requested state is justiciable by the courts in the requested state. To this end learned DPP submitted that since the appellant has committed the relevant offences by conspiring with the co-conspirators therefore the offences committed by the appellant can be regarded as a continuous offence and that a part of it
G was committed in the US. Therefore learned DPP submitted that the US court has jurisdiction in this case. Learned DPP referred to the cases of *PP v. Loh Ah Hoo* [1974] 1 LNS 121; [1974] 2 MLJ 216; *Ajay Agarwal v. Union Of India* AIR 1993 S.0 1637; *Mobarik Ali Ahmed v. The State of Bombay* (S) AIR 1957 S.0 857 (V 44 C 125 Dec.)

H **[29]** Though we appreciate the lengthy illustration by the learned DPP on the application of different approaches that can be considered by this court for the determination and satisfaction of the dual criminality principle, we however stand not persuaded by his contention. At the heart of the matter lies the issue of whether the appellant could be extradited, when he was not
I corporeally present in the US at the time of the commission of counts 1-3. The issue was whether the appellant could be extradited for extraterritorial offences.

[30] As rightfully pointed out by learned counsel for the appellant, the offences against the appellant ie counts 1-3 were extraterritorial offences. Hence, to satisfy the dual criminality requirement the corresponding offences in Malaysia had to be extraterritorial offences in Malaysia. Put simply, the dual criminality rule required extraterritoriality to extraterritoriality. That standpoint is reflected in the Treaty between Malaysia and the US. Article 2(5) of the Treaty reads:

> If the offence has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the requested state provide for punishment of an offence committed outside its territory in similar circumstances, and if the requirements of extradition under treaty are otherwise met. If the laws of the requested state do not so provide the executive authority of the requested state may, in its discretion, deny extradition.

[31] Article 2(5) clearly provides that "If the offence has been committed outside the territory of the requesting state, extradition shall be granted if the laws of the requested state provide for punishment of an offence committed outside its territory in similar circumstances". Counts 1-3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export, which are punishable under the Penal Code and or the Customs Act.

[32] The issue now is whether the corresponding offences in Malaysia has exterritorial effect. In relation to extraterritorial offences, the Extra-Territorial Offences Act 1976 deals "with certain offences under written laws committed in any place without and beyond the limits of Malaysia and on the high seas on board any ship or on any aircraft registered in Malaysia or otherwise as if they were committed in Malaysia." Section 2(1) of the Extra-Territorial Offences Act 1976 read together with the schedule makes an act contrary to the Official Secrets Act 1972 and the Sedition Act 1948 as offences and

> "any offence under any other written law the commission of which is certified by the Attorney General to affect the security of the Federation" as an offence, "if such act is done or such offence is committed (i) on the high seas on board any ship or on any aircraft registered in Malaysia; (ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; and, (iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia, be punishable as an offence under the relevant written law as if such act or offence were done or committed in Malaysia".

[33] Hence, our domestic law provides for the operation of our law beyond our territorial limits only to offences under the Official Secrets Act, the Sedition Act, and to offences under Chapters VI, VIA, and VIB of the Penal Code. Our law does not extend to other offences committed beyond our territorial limits, even if it is an offence committed in Malaysia. The law of

a requesting state may provide for its jurisdiction differently. But in relation to the corresponding offence in Malaysia, we need to look at our law. If there is no corresponding offence in Malaysia, then requisition must be refused, regardless of whether the requesting state has local or extraterritorial jurisdiction. Thus, the key to unravel a requisition for the return of a criminal fugitive is the corresponding offence in Malaysia which must have extraterritorial effect.

[34] Having said that, we would like to highlight here that by an amendment to the Penal Code, the list of extra-territorial offences was extended to Chapters VI, VIA and VIB of the Penal Code (being chapters on offences against the state, offences relating to terrorism, and organised crime), if such act is done or such offence was committed in similar circumstances as stated in s. 2 of the Extradition Act. However, the list of extra-territorial offences was not extended to Chapter V on criminal conspiracy. Thus, with respect, we find that the dual criminality requirement has not been satisfied here as the preferred offences have no extraterritorial effect under the Penal Code. Counts 1-3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export, which are punishable under the Code and or the Customs Act. But our laws do not provide for punishment of counts 1-3 committed outside our territory. They were extraterritorial offences in the US, but not in Malaysia. Hence, with respect, we must therefore rule that the statement in *PP v. Sajad Farhadi* (Criminal Application No 44-217-12/2012), *to wit* "it is observed that all these offences were not extraterritorial offence under s. 4 of the Penal Code. As such all offences are not extraterritorial in the US", was a wrong statement of law and should not be followed.

[35] Now, in our judgment, we find that the effect approach and continuing approach advanced by the learned DPP had no application. In these circumstances we would like to refer to a few cases cited by learned DPP which we feel will shed some light on the suitability of the "effect approach" and the "continuing approach".

[36] To begin with, the case of *Office of the King's Prosecutor, Brussels v. Cando Armas And Another* [2006] 1 All ER 647 *(Cando Armas)* specifically provides under s. 65(3) of the United Kingdom's Extradition Act 2003 that the requesting state would have jurisdiction to request for the extradition of an individual even if the offences were not committed in the territory of the requesting state so long as the effect is felt there. This case concerned the provisions of a special extradition framework for simpler surrender procedures between members of the European Union that was "funded on member states" confidence in the integrity of each other's legal and judicial systems" (per Lord Bingham of Cornhill). We find with respect that this case had no application at all. If at all, it merely attested that the 'effect approach' justifies the exercise of criminal jurisdiction by a requesting state. At para. 35 of the report, Lord Hope of Craighead (Lord Scott of Foscote, Baroness Hale now Lady Hale of Richmond, Lord Carswell concurring) said:

> It is now well established that the physical presence of the defendant in the territory is not required so long as the effects of his actions are felt there. The rule is matched by its corollary which is that, if the effects of those actions were intentionally felt here, criminal jurisdiction can be exercised in respect of their effect irrespective of where the actions took place that gave rise to them.

[37] Moreover, it was held by the House of Lords that if the requesting state falls under a category 1 territory of the United Kingdom's Extradition Act 2003, the dual criminality requirement need not be satisfied. This can be seen from the judgment of the House of Lords at paras. 34-35 which reads:

> 34. Common to the first condition about the place of the conduct, irrespective of the subsection under which it has to be satisfied, are two questions: (1) whether the person must be within the territory of the requesting state at the time of the conduct which he is alleged to have committed, and (2) whether the conduct must have occurred exclusively within that territory. In many cases, of course, these will not be live issues as it will be plain that the conduct occurred exclusively in the territory of the requesting state. But many of the offences in the framework list such as trafficking in human beings are commonly committed across borders. The appellant is alleged to have engaged in conduct of that kind, so these questions must be addressed in his case.
>
> 35. The answers are to be found in the first place in the language which has been used by the legislature which Lord Bingham has analysed. The context in which that language has been used is, of course, provided by the common law. It is provided in particular by the rules which apply when jurisdiction is claimed on the basis of territoriality. It is now well established that the physical presence of the defendant in the territory is not required so long as the effects of his actions were intentionally felt there. That rule is matched by its corollary which is that, if the effects of those actions were intentionally felt here, criminal jurisdiction can be exercised in respect of their effect irrespective of where the actions took place that gave rise to them. Section 65(2) modifies these rules in the case of framework offences where the test of double criminality is dispensed with, as it requires that no part of the conduct took place in the United Kingdom. But the test of whether conduct occurs in the category 1 territory is satisfied for the purposes of section 65(3) so long as its effects were intentionally felt there, irrespective of where the person was when he did the acts which constituted such conduct.

[38] *Vincenzo Melia v. United States of America and William F. Smith, Attorney General (supra)* concerned the extradition of a US resident from US to Canada. Canada alleged that Melia conspired with persons in Canada to murder the girlfriend of Melia's brother. Section 423(1)(a) of the Canadian Criminal Code gave jurisdiction to Canadian courts over Melia, which jurisdiction Melia disputed. Article 3 s. 3 of the Extradition Treaty provided for extradition, if the act took place outside the requesting state and the laws of the requested state provided for jurisdiction over such offence committed

in similar circumstances. That case concerned a special arrangement between the two countries. That case underscored that the 'effect approach' justifies the extension of territorial jurisdiction, where Timbers, Circuit Judge, cited the following statement of law from Justice Holmes in *Strassheim v. Daily*, 221 US 280, 285 (1911):

> Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect ...

[39] *Onwuzulike v. United States Of America* [2009] EWHC 1395 (Admin) *(supra)* also affirmed that the 'effect approach' vindicates the jurisdiction of the requesting state. In that case, the US sought extradition of Onwuzulike, a United Kingdom citizen, from the UK to US to stand trial for mail fraud and wire fraud. The Crown Prosecution also wanted to prosecute Onwuzulike but agreed to the US prosecution to take precedence. On 9 July 2008, the Secretary of State ordered the appellant's extradition. On 22 July 2008, Onwuzulike lodged a statutory appeal. One of the points raised against extradition was that the alleged offences were done in London. At issue was the appropriate forum, UK or US, and the impact of the offences, which being substantially more in the US than in any one single country, was one of the factors that decided it in favour of the US. It was on the basis of the impact or effect of the fraud that the requesting state asserted its jurisdiction.

[40] As for *Mobarik Ali Ahmed v. The State of Bombay* and *Ajay Agarwal v. Union of India (supra)*, they were not extradition proceedings. They were trials of Indian citizens who initiated and or committed the offences abroad but which the Indian courts had jurisdiction to try those offences, although committed abroad, by reason of s. 188(a) of the Indian Criminal Procedure Code which provided that "when an offence is committed outside India, by a citizen of India, whether on the high seas or elsewhere, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found ... with the previous sanction of the Central Government", "such that the Indian Penal Code had territorial operation" (see para. 6 of *Ajay Agarwal*).

[41] The case of *Loh Ah Hoo (supra)* concerned the prosecution of an offence committed within the local jurisdiction. All latter three cases were not authorities on the 'continuing approach' in extradition proceedings. But they said that where an offence is initiated abroad but completed within the local jurisdiction, the local jurisdiction could assert jurisdiction.

[42] In our considered view it is not denied that the "effect approach" and the "continuing approach" *albeit* facilitates extradition we must not lose sight of the fact that the 'effect approach' 'impact approach' or 'continuing approach' only rationalises the jurisdiction of the requesting state, as in *United States of America v. Frank Santo Cotroni (supra)*, where it was held "it

is often better that a crime be prosecuted where its harmful impact is felt and where its witnesses and the persons most interested in bringing the criminal to justice reside" (per La Forest J delivering the judgment for Dickson CJ, La Forest, L'Heureux-Dube, Gonthier and Cory JJ).

[43] The 'effect approach', and 'continuing approach' will not change an extraterritorial offence to a territorial offence. As we have stated earlier, given that counts 1-3 of the indictment were extraterritorial offences, then the corresponding offences in Malaysia had to be extraterritorial offences. Here, the corresponding offences under the Penal Code had no extraterritorial effect as it did not fall under Chapter 4, thus the dual criminality rule has not been satisfied.

[44] Counts 1-3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export, which are punishable under the Penal Code and or the Customs Act. But our laws do not provide for punishment of counts 1-3 committed outside our territory. They were extraterritorial offences in the US, but not in Malaysia.

[45] In this regard we agree with the submissions of learned counsel for the appellant that an individual can only be tried for offences committed abroad if it is specifically provided under statute without more the courts cannot extend its jurisdiction to try an individual on the basis that even though the act was wholly committed abroad the effect of it was felt locally.

[46] As an authority for this proposition learned counsel referred to the case of *Wong Yuh Lan v. PP* [2012] 4 SLR 845. In that case the United States of America (US) made a requisition to the Minister for Law ("the Minister") for the extradition of Lim Yong Nam ("Nam"), Lim Kow Seng ("Seng"), Hia Soo Gan Benson ("Hia") and Wong Yuh Lan ("Wong") (collectively termed "the applicants") to the US to stand trial. The requisition was made pursuant to the United States of America (Extradition) Order in Council 1935 (Cap 103, OR 1) which contained the extradition treaty between the Singapore and the US ("the Singapore-US Treaty"). The US District Court issued warrants of arrest against the applicants on 15 September 2010 for 12 counts of conduct.

[47] The Singapore Attorney-General's Chambers on behalf of the State sought the committal of Wong and Nam only for Count One of the Superseding Indictment for conspiracy to defraud the US by dishonest means under Title 18 United States Code s. 371 ("18 USC § 371"). The US accused Wong and Nam of conspiring with one Hossein A Larijani, Paya Electronics Complex ("Paya Electronics"), Opto Electronics Pte Ltd ("Opto Electronics"), NEL Electronics Pte Ltd ("NEL"), Corezing, Seng and Hia to defraud the US by exporting modules from [Company A] ("Company A modules"), a US company, from the US to Iran *via* Singapore. The US complained that this breached US export restrictions against unauthorised shipment of the US-origin goods from a third country to Iran.

[48] The District Judge issued a warrant for the apprehension of the applicants on 12 October 2011, pursuant to s. 9(1)(a) read with s. 10(1)(a) of the Extradition Act (Cap 103, 2000 Rev Ed) ("the Extradition Act 2000"). The applicants were apprehended on 25 October 2011 and held in remand until their committal hearing on 9 and 12 December 2011. On 10 February 2012, the District Judge committed the applicants to custody under a warrant of commitment under s. 11(7) of the Extradition Act 2000. Pending extradition, the applicants sought an Order for Review of Detention before the High Court Judge under s. 417 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("CPC 2010") (previously known as a writ of *habeas corpus*). The State, an interested party to the proceedings, opposed the summonses for an order for review of detention.

[49] In the said case, it was argued by the counsel of Hia and Lim, that the US courts' does not have jurisdiction to try them in view that their conduct *vis-à-vis actus reas* took place entirely outside the US thus the corresponding offence in Singapore under s. 109 of the Singapore Penal Code did not have extraterritorial application in the light that s. 108B of the Singapore Penal Code that extended the extraterritorial application of the said section only came into force on 1 February 2008, (a year after the alleged offence was committed). In reply it was argued by counsel for the respondent, that the courts in the US have jurisdiction bearing in mind that the effect of the act was felt on US soil despite the fact that Hia and Lim were in Singapore. In deliberation Choo Han Teck J held that even though the effect of the *actus reas* was felt in the US, the courts there can only have jurisdiction if the act was committed in the US. However if it was committed abroad in absence of any overt acts the courts therefore have no jurisdiction. In view that pursuant to the principle of dual criminality the Singapore Courts cannot extend its jurisdiction to include extraterritorial offence committed abroad if it is not provided under statute (namely the Singapore Penal Code) even though the consequence of the act takes effect in Singapore. This is what the learned judge had said:

> The main argument advanced by Mr Haq was based on extraterritoriality, namely, that the acts allegedly committed by Seng and Hia took place entirely outside the US and the Singapore courts would not have jurisdiction to try acts of abetment occurring outside Singapore. Section 109 of the Penal Code did not have extraterritorial application until s 108 B of the Penal Code came into force with effect from 1 February 2008. Criminal jurisdiction has traditionally been confined to the territory of the state. The Court of Appeal in *PP v. Taw Cheng Kong* [1998] 2 SLR (R) 489 ("*Taw Cheng Kong*") held that there was a presumption against the extraterritorial application of legislation (in absence of express words to the contrary) as a matter of comity and in observance of the sovereignty of other nations (at [66]-[69]). A strict application of the territorial principle would exclude jurisdiction over acts that occur partly or entirely outside the territory, notwithstanding that the effect of those acts was felt in the territory.

[50] Further, the learned judge had analysed the approach in England and held that it is not applicable in Singapore as follows:

> Another way courts have dealt with the problem of double criminality is by deeming that an act that begins or occurs outside the territory of the requested state but which is completed within the territory of the requested state is justiciable by the courts in the requested state (ie, "the continuing act" doctrine). The English courts have extended the territorial principle in order to assume jurisdiction, even if every element of the crime was committed abroad, if the "effects" of the crime were felt in England - such as in the case of a conspiracy entered into wholly abroad but the object of which was to commit an offence in England (see *Somchai Liangsiriprasert v. Government of the United States of America* [1991] 1 AC 225 ("*Somchai Liangsiriprase*rt")). Whatever the approach, it is clear that in jurisdictions like the UK and Canada, the territorial principle is increasingly being abandoned. Singapore on the other hand continues to adopt a strict territorial approach for the exercise of criminal jurisdiction. The Court of Appeal in *Taw Cheng Kong* emphasised that any recognition of the "effects" doctrine, for example, must be left in Parliament's hands (at [85]-[88]).

[51] The learned judge then made the following observations:

> Mr Jayaratnam urged me to adopt the position in England where a conspiracy made outside the territory, the object of which was to commit an offence in the territory, is justiciable even if no overt act pursuant to the conspiracy had yet occurred in England. The Privy Council in *Somchai Liangsiriprasert* considered this issue fully for the first time. The accused argued that such a conspiracy was not a common law crime unless either some overt act pursuant to the conspiracy took place in England, or alternatively, unless the impact of the conspiracy was felt in England. The Privy Council rejected this view. Lord Griffiths stated at 251:
>
> > But why should an overt act be necessary to found jurisdiction? In the case of conspiracy in England the crime is complete once the agreement is made and no further overt act need be proved as an ingredient of the crime. The only purpose of looking for an overt act in England in the case of a conspiracy entered into abroad can be to establish the link between the conspiracy and England or possibly to show the conspiracy is continuing.
>
> The Court of Appeal in *Taw Cheng Kong* (at [87]) cited the passage above from *Somchai Liangsiriprasert* but was of the view that such change could only be effected by Parliament. Parliament has chosen to address the *lacuna* by introducing s. 108 B into the Penal Code to capture acts of abetment committed overseas of an offence committed in Singapore, and for the abetment provisions to extend to persons "who perpetuate their criminal intentions from afar" (Singapore Parliamentary Debates, Official Report (22 October 2007) vol 83 at col 2184). Section 108 B of the Penal Code would apply to acts of abetment committed on or after 1 February 2008.

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> ... Chia could not be prosecuted because all the alleged acts of instigation had taken place outside Singapore (United States) before 1 February 2008 ... .

[52] In *PP v. Taw Cheng Kong* [1998] 2 SLR (R) 489 a similar sentiment was echoed by Yong Pung How CJ of Singapore where it was held that the courts
B in Singapore cannot assume jurisdiction for acts committed abroad even if the effect of it is felt in Singapore when such jurisdiction it is clearly not provided under statute, to do so would be usurping the function of the Parliament, even if the effect approach doctrine is a good approach to follow. The *dictum* of the learned Chief Justice of Singapore can be observed as follows:

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> As Singapore becomes cosmopolitan in the modern age of technology, electronics and communication, it may well be more compelling and effective for Parliament to adopt the effects doctrine as the foundation of our extraterritorial laws in addressing potential mischief. But we must not lose sight that Parliament, in enacting such laws, may be confronted with other practical constraints or considerations which the courts are in
D no position to deal with. The matter, ultimately, must remain in the hands of Parliament to legislate according to what it perceives as practicable to meet the needs of our society.

[53] The next case we would like to highlight is the Malaysian Supreme Court case of *PP v. Rajappan Chinna Kounder* [1986] 1 CLJ 175; [1986] 1 MLJ
E 152. The then Supreme Court had stressed that even though the *actus reas* was committed abroad and continued into our jurisdiction, our courts would not be able to try the accused unless specifically provided under statute. In that case Mr Rajappan had remarried for the second time in India and brought his second wife back to Malaysia with the intention of continuing the
F marriage here. He was then charged under s. 494 Penal Code for an offence of bigamy. The learned Deputy Public Prosecutor argued that even though the marriage took place it India nevertheless the *actus reas* continued here in Malaysia and therefore the courts in Malaysia should have jurisdiction to try him for the said offence. Learned counsel for Mr Rajappan conversely argued
G that the courts in Malaysia have no jurisdiction to try him for the offence of bigamy in the light that the *actus reas* was formed in India. It was stressed that s. 494 Penal Code is not an extra territorial offence, and even if the offence continued into our jurisdiction there must be specific powers conferred upon the courts the jurisdiction to try him for the said offence in the light that the
H offence was formed abroad. The Supreme Court agreed with learned counsel for Mr Rajappan. Salleh Abas LP at p. 155 in his judgment held that:

> Our Penal Code does not make all offences under the Code to be extra-territorial. It only makes offences against the State to be extra-territorial; nor does our CPC provide for the venue of the trial of persons who have committed acts abroad which would have been offences, if committed in
I Malaysia.

> Every piece of legislation is presumed to have effect only within the territory of the legislature. If effect is intended to extend beyond the territory the enactment to that effect must be clear and beyond dispute.

[54] Salleh Abas LP further held that:

> According to an established principle of international law crimes and criminal acts are matters for the State, within whose territory the criminal acts are committed, irrespective of the nationality of the offenders. International law also recognises that a State has the power to punish its nationals or its permanent residents for criminal acts committed by them outside its territory. But to translate this principle into municipal law (i.e domestic law of the State) a clear provision must be made to this effect in its municipal law. We have seen that there is no statute which could be said to have extra-territorially extended section 494 of the P.C. It seems that the bulk of our criminal law has only a territorial effect, i.e., confined to acts committed within the territories of Malaysia.

Salleh Abas LP was of the view that even though the offence of bigamy was committed in India and continued to be practiced in Malaysia, there must be specific jurisdiction conferred upon the courts in Malaysia to try Mr Rajappan for the bigamy offence in view that the marriage was legalised abroad, and the fact that it continued to be practiced in Malaysia is irrelevant in context of the said offence:

> It is ridiculous for Parliament to deem an act committed abroad to be an offence without giving jurisdiction to try such offence to any particular court or courts. The truth is that as court is not given the jurisdiction, the act complained of cannot be an offence.

[55] The last case we would like to refer to is the case of *PP v. Lin Chien Pang Aka "Teacher Lin" "Saenwoo Asue"* [1993] 2 CLJ 225, where the US government made a request for the extradition of Lin Chien Pang. In order to support the extradition application it was argued by the learned DPP that despite the fact that Lin Chien Pang never set foot in America, the offences in the preferred charges can sustain the application in the light that the US government has jurisdiction by virtue that the drugs were imported into the local jurisdiction of the US government. Counsel for Lin Chien Pang argued that the offences in the preferred charges are extra-territorial offences which if committed abroad would not be indictable in our jurisdiction as our Dangerous Drugs Act 1952 has no extra-territorial application. It was also argued that the case of *PP v. Rajappan (supra)* has clearly set the new landscape on whether our courts have the jurisdiction to try offences committed abroad, and it was submitted on that note that even if the offences continued into our country, our courts can only have jurisdiction if such powers are clearly spelt out in the relevant legislation, *inter alia* as the jurisdiction of the courts is a creature of statute the courts cannot go beyond the jurisdiction provided by it.

[56] In deliberation Mokhtar Sidin J (as he then was) held as follows:

> It is evidenced before the Court that this is an extra-territorial offence. It is undisputed fact the fugitive criminal has never set foot in the United States before, during or after the commission of the alleged offences. He had all the time been based in Bangkok and had come to Kuala Lumpur, to receive the proceeds of the sale of shipment of heroin ...
>
> It may be that the fugitive criminal had committed an offence or offences punishable under the laws of the United States, but after carefully considering the provisions of s. 6 of the Extradition Act, I am of the view that the offences committed by him against the United States, is not punishable under the laws of Malaysia since the second limb of s. 6(2b) is not satisfied. The Dangerous Drugs Act having no extra-territorial effect offences under it if committed outside the jurisdiction of Malaysia is not punishable under the laws of this country. As such the offences committed by the fugitive criminal are not extradition offences under the Extradition Act 1992.
>
> The Appellant contended that those offences were not extra-territorial offences as found by the learned Sessions Court Judge. It was submitted that since the heroin was actually imported into the United States pursuant to the conspiracy, aiding and/or abetment thereof by the respondent, the respondent had committed the offences in the U.S ... In addition to the case of *Mobarik Ali Ahmed* the Appellant also cited the case of *PP v. Loh Ah Soo* [1974] 1 LNS 121; [1974] 2 MLJ 216; *Lee Szu Yui* [1961] 1 LNS 47[1962] MLJ 49 and *P.P. v. Yong Nam Song* [1964] 1 LNS 154 [1964] MLJ 85 to support his contention. In my view in those cases/ there were clear evidence to show that the Accused persons in those cases were the people who had signed the declaration forms which were used to commit the offences. Thus those cases could be easily distinguished from the present case. The Appellant also referred to the case of *P.P. v. Khoo Ban Hock & Ors.* [1987] 1 LNS 58[1988] 2 MLJ 217. I agree with the learned defence Counsel for the respondent that the facts stated in that case were insufficient in order for me to make any ruling that the principle in that case could be applied in the present case.
>
> The question whether the offence is extra-territorial or otherwise had been discussed at great length in the case of *PP v. Rajappan* [1986] 1 CLJ 175; [1986] 1 MLJ 152. This was a decision of the Supreme Court consisting of five judges which appears to me a very strong panel. The accused in that case was charged for bigamy when he married another woman in India when the first marriage was still subsisting. The accused then brought the wife of the second marriage to Malaysia and lived with her. It appears that the bigamous marriage continued in Malaysia. The Supreme Court held that the Court in Malaysia had no jurisdiction to try the Accused since the second marriage took place outside Malaysia.
>
> For the above reasons I agree that the learned Sessions Court Judge was correct in holding that the offences were extra-territorial in nature. She had come to the correct conclusion.

> The case of *PP v. Rajappan* also dealt at great length with the second question posed by the Appellant. There is no necessity for me to repeat them. It is sufficient for me to say the learned Sessions Court Judge had applied the principles correctly in the present case. I agree with the conclusion made by the learned Sessions Court Judge. Her decision in respect of this is hereby confirmed and she was right in her decision in refusing to order the extradition of the respondent.

[57] In determining the dual criminality requirement, learned DPP urged this Honourable Court to adopt the "broad conduct approach" as postulated in the case of *Re Nielsen* [1994] AC 606 which was followed in the case of *Norris v. Government of the United States of America* 2 All ER 1103. In our judgment we find that the "conduct approach" is a much more apt test which can be applied to determine whether the dual criminality rule has been satisfied.

[58] In *Nielsen*, Lord Diplock (Lord Keith of Kinkel, Lord Roskill, Lord Bridge of Harwich and Lord Brightman concurring) enunciated that the starting point, to determine whether there is an extradition offence, is to inquire whether the conduct, if it had taken place in the requested state, would have fallen foul of the laws of the requested state:

> The introductory words to both the 1870 and the later list provide that the list of crimes is to be construed according to the law existing in England at the date of the alleged crime. So in order to determine whether conduct constitutes an "extradition crime" within the meaning of the Acts of 1870 to 1932, and thus a potential ground for extradition if that conduct had taken place in a foreign state, one can start by inquiring whether the conduct if it had taken place in England would have fallen within one of the 19 generic descriptions of crimes in the 1870 list. If it would have so fallen the inquiry need proceed no further where, as in the case of the principal treaty with Denmark, the extradition treaty with the foreign state demanding the surrender of a person as a fugitive criminal incorporates the whole of the 1870 list in the descriptions of crimes for which surrender may be required and makes no modification to those descriptions.

[59] The 'conduct test' was upheld in *Norris v. Government of the United States Of America And Others (supra)*, where Lord Bingham, delivering the composite opinion of the committee, said:

> The magistrate's task, in short, was simply to examine the evidence produced by the requesting state to decide whether, according to English law, it would justify the accused's committal for trial for a listed offence. As Lord Diplock made plain in successive decisions of this House in *Govt of Denmark v. Nielsen* [1984] 2 All ER 81, sub nom *Re Nielsen* [1984] AC 606 and in *United States Govt v. McCaffery* [1984] 2 All ER 570, [1984] 1 WLR 867, the conduct test was to be applied:

A [T]he magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state. (See *Nielsen*'s case [1984] 2 All ER 81 at 91, [1984] AC 606 at 624.)

B [T]he test whether a person in respect of whom a warrant for his arrest had been issued in a foreign state for an offence alleged to have been committed in that state was liable to be surrendered as a fugitive criminal was not whether the offence specified in the foreign warrant of arrest as that for which it had been issued was substantially similar to a crime under English law falling within the C list of offences described in Sch 1 to the Extradition Act 1870, as currently amended (ie the so-called "double criminality" test). The right test, as stated by the Divisional Court in *Nielsen*'s case, was whether the conduct of the accused, if it had been committed in England, would have constituted a crime falling within one or more of the descriptions included in that list. (See *McCaffery*'s case D [1984] 2 All ER 570 at 572, [1984] 1 WLR 867 at 869.)

[60] Based on the conduct approach, in our considered view the appellant in this case cannot be extradited as the preferred charges brought against him concerns offences committed abroad that does not have extra-territorial application in Malaysia. It is an undisputed fact that the appellant has never E set foot in the US soil. In order for the US courts to have jurisdiction to try the appellant for those alleged offences, the alleged offences of forgery and preparing false declaration by undervaluing the airways bills (as stated in the preferred Malaysian charges) must be allegedly done by the appellant himself in US and not by anyone or anywhere else outside its territorial jurisdiction. F Learned counsel referred us to the email communications made by the appellant to which it was submitted that the courts in the United States cannot assume jurisdiction (be it adopting the effect approach nor the continuing approach) to try the appellant in view that there were no alleged overt acts in the form of any alleged email communications made by the G appellant which can be considered as taking place in the US in relation to the Penal Code offences as stated in the preferred charges.

[61] From the documentary evidence it can be inferred that the alleged false declaration and forgery by way of air way bills for the purchase of the "2010-1 Cavity Black Spiral Antennas" and the "3120 Biconical Antennas" H from a company known Microwave Engineering Corporation by Antennas and Components Ltd based in Massachusetts US for Corezing International was not made in the US but rather was allegedly made in Singapore by agents of Corezing International, namely Hia and Lim.

[62] Thus, the appellant cannot be deemed as an alleged conspirator in I relation to the Penal Code offences stated in the preferred charges. This is because there were no evidence provided in the supporting documents *vis-a-*

vis affidavit of Agent David Parker to show that the appellant was ever involved in any alleged arrangement of conspiracy made between Corezing International Pte Ltd and Antennas & Components to export the said antennas to Singapore without a licence either *via* undervaluing the airway bills or modifying the frequencies of the said antennas.

[63] Even though the appellant allegedly communicated *via* email with agents of Corezing International Pte Ltd as enclosed in exh. 9, it was an isolated act and should not be deemed as part of the conspiracy as it was purely in relation to payments for companies in Iran, nothing therein to show that the appellant conspired or instructed agents of Corezing International to export the said antennas without licence or modify frequencies of the said antennas and/or undervalue the airway bills to avoid the licencing requirements. Nothing of that sort or anything illegal were ever mentioned throughout the said email communications between the appellant and agents of Corezing International or in any email communications where the appellant was privy to.

[64] To reiterate our views aforesaid, in order for the US courts to have jurisdiction to try the appellant for those alleged offences, the alleged offences of forgery and preparing false declaration by undervaluing the airway bills (stated in the preferred Malaysian charges) must be allegedly done by the appellant himself in the US and not by anyone or anywhere else outside its territorial jurisdiction. However in this case the alleged false declaration and forgery by way of air way bills for the purchase of the "2010-1 Cavity Black Spiral Antennas" and the "3120 Biconical Antennas" were from a company known Microwave Engineering Corporation by Antennas and Components Ltd based in Massachusetts US for Corezing International was not made in the US but rather was allegedly made in Singapore. It was made by the agents of Corezing International.

[65] Thus, anchored by the authorities cited above that the appellant in this case cannot be extradited for the charges preferred against him especially when the corresponding offences stated in the charges are offences with no extra territorial application under s. 4 Penal Code, *vis-a-vis* they are not extraditable offences. In these circumstances, we find that both the Sessions and the High Court had misapplied the facts and the applicable laws on their finding on the issue of dual criminality. On that basis, we are of the view that the dual criminality requirement as provided under the Extradition Act and the Extradition Treaty were not complied with in respect of the preferred offences advanced by the respondents.

[66] Based on the reasons discussed above we were satisfied that both the Sessions Court and High Court had committed errors of law which warranted appellate intervention. We did not dwell on the other subsidiary issues raised in this appeal as in our considered view answering them will not alter our final conclusion in this appeal one way or another.

[67] For the above reasons we allowed the appellant's appeal and granted the writ of *habeas corpus*. The decisions of the learned High Court Judge and the Sessions Court were set aside.

[68] My learned brother Jeffrey Tan FCJ agrees entirely with the result we have arrived at and the orders we made in this appeal. However, he had prepared a separate judgment to give his own reasons.

Jeffrey Tan FCJ:

[69] I have read the judgment of the learned President, Raus Sharif PCA, and I entirely agree with the result. But my reasoning is not exactly the same.

[70] I need not set out the background facts and the proceedings below, as they have been comprehensively set out by the learned President. I adopt the learned President's summary of the submissions before us and agree with the quoted passages from the judgment of the learned President.

[71] Before us, the appellant canvassed six grounds of appeal as can be found in his petition of appeal, which, all, had to do with the dual criminality pre-requisite under ss. 6(2) and 20(1)(c) of the Extradition Act in consonant with art. 2 of the Extradition Treaty has been satisfied by the respondents to support the committal of the appellant under s. 119, s. 417, s. 468 and s. 471 of the Penal Code. According to learned counsel, the principle of dual criminality requires extraterritorial offences in the US to be extraterritorial offences in Malaysia, in order to satisfy the principle of dual-criminality to justify extradition, that the four alleged corresponding offences found by the Sessions Court were not extradition offences committed by the appellant and or were not committed within the territorial jurisdiction of the United States, and that the alleged corresponding offences had no extraterritorial application under s. 4 of the Penal Code or under the Extra-Territorial Offences Act 1976, that is even if the facts were transposed in Malaysia (see judgment of the learned President).

[72] The deputy public prosecutor (DPP) who appeared for the respondents replied that the proviso to s. 6(2) of the Extradition Act, and art. 2(5) of the Extradition Treaty, with respect to extraterritorial jurisdiction, were not applicable, as the alleged offences fell within the territorial jurisdiction of the US District Court for the District of Columbia by reason of the application of the 'effect approach' (learned DPP cited *Office of the King's Prosecutor, Brussels v. Cando Armas and another* [2006] 1 All ER 647; *Vincenzo Melia v. United States of America* 667 F.2d 300 1981; *United States of America v. Cotroni* [1989] 1 RCS 1469; 161 *Onwuzulike v. United States of America* [2009] EWHC 1395 (Admin) Divisional Court), the 'broad approach' (learned DPP cited *Re Nielsen* [1994] AC 606 which was followed in *Norris v. Government of the United States of America* 2 All ER 1103), and, the 'continuing approach' (learned DPP cited *PP v. Loh Ah Hoo* [1974] 2 MLJ 216; *Ajay Agarwal v. Union of India* AIR 1993 SC 1637; *Mobarik Ali Ahmed v. The State of Bombay* (S) AIR 1957 SC 857) (see judgment of the learned President).

[73] The Extradition Treaty between Malaysia and the US, obliges Malaysia and the US to surrender criminal fugitives to the other in accordance with the articles of the treaty.

[74] Domestic law, namely the Extradition Act, permits the Minister to surrender criminal fugitives to a requesting country in accordance with the procedure and requirements, but subject to the restrictions, as set out in the Extradition Act. Under the procedure provided by the Act, a requisition for the return of a criminal fugitive to the requesting country sets into motion the extradition process, which entails a hearing of the representation made in support of the extradition request in accordance with s. 20 of the Act, which, the relevant part, reads:

> (1) Where a direction has been given by the Minister under s. 4, the Sessions Court shall:
>
> (a) after hearing any representation made in support of the extradition request;
>
> (b) upon the production of supporting documents in relation to the offence;
>
> (c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;
>
> (d) if the fugitive criminal does not satisfy the court that there are substantial grounds for believing that:
>
> (i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;
>
> (ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;
>
> (iii) the offence is an offence under military law which is not also an offence under the general criminal law;
>
> (iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;
>
> (v) the fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;
>
> (e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought,

A commit the fugitive criminal to prison to await the order by the Minister for his surrender.

(2) In the proceedings before the Sessions Court under sub-s. (1) the fugitive criminal is not entitled to adduce, and the court is not entitled to receive, evidence to contradict the allegation that the
B fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.

[75] In common with the extradition law of many countries, s. 6(2)(b) of the Act provides that "an extradition offence is an offence, however described, including fiscal offences … which, if committed within the
C jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death".

[76] That definition of an extradition offence is subject to the following proviso:

D Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

[77] Consonant with s. 6(2)(b) of the Act, s. 20(1)(c) of the Act provides that the Sessions Court shall commit the criminal fugitive to prison to await the order by the Minister for his surrender if the Sessions Court is satisfied,
E *inter alia*, "that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia".

[78] In relation to extraterritorial offences, the Extra-Territorial Offences
F Act 1976 deals 'with certain offences under written laws committed in any place without and beyond the limits of Malaysia and on the high seas on board any ship or on any aircraft registered in Malaysia or otherwise as if they were committed in Malaysia'. Section 2(1) of the Extra-Territorial Offences Act 1976 read together the Schedule makes an act contrary to the
G Official Secrets Act 1972 and the Sedition Act 1948 as offences and 'any offence under any other written law the commission of which is certified by the Attorney General to affect the security of the Federation' as an offence, 'if such act is done or such offence is committed (i) on the high seas on board any ship or on any aircraft registered in Malaysia; (ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; and,
H (iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia, be punishable as an offence under the relevant written law as if such act or offence were done or committed in Malaysia' (see judgment of the learned President).

I **[79]** By an amendment to the Penal Code (the Code), the list of extra-territorial offences was extended to Chapters VI, VIA and VIB of the Code (being chapters on offences against the state, offences relating to terrorism, and organised crime), if such act is done or such offence was committed in

similar circumstances as stated in s. 2 of the Extradition Act. Pertinently, the list of extra-territorial offences was not extended to Chapter V on criminal conspiracy (see judgment of the learned President). A

[80] Hence, our domestic law provides for the operation of our law beyond our territorial limits only to offences under the Official Secrets Act, the Sedition Act, and to offences under Chapters VI, VIA, and VIB of the Code. Our law does not extend to other offences committed beyond our territorial limits, even if it is an offence if committed in Malaysia. The law of a requesting state may provide for its jurisdiction differently. But in relation to the corresponding offence in Malaysia, we need to look at our law. If there is no corresponding offence in Malaysia, then requisition must be refused, regardless of whether the requesting state has local or extraterritorial jurisdiction. Thus, the key to unravel a requisition for the return of a criminal fugitive is the corresponding offence in Malaysia (see judgment of the learned President). B C

[81] The litmus test is the corresponding offence in Malaysia, from the aspect of the alleged criminal conduct and the jurisdiction to punish. The jurisdiction of the requesting state is relevant where there is a corresponding offence in Malaysia. But otherwise, it will not serve any purpose to delve into the jurisdiction of the requesting state, in the absence of a corresponding offence in Malaysia. I therefore find that the authorities cited on the 'effect approach' as well as the 'continuing approach', to show the jurisdiction of the requesting state, were not helpful at all to resolve the issue of the corresponding offence/s in Malaysia. D E

[82] To begin with, the case of *Office of the King's Prosecutor, Brussels v. Cando Armas and Another* [2004] All ER 115 concerned the provisions of a special extradition framework for simpler surrender procedures between members of the European Union that was "funded on member states' confidence in the integrity of each other's legal and judicial systems" (per Lord Bingham of Cornhill). That case had no application at all. If at all, it merely attested that the 'effect approach' justifies the exercise of criminal jurisdiction by a requesting state. At para. 35 of the report, Lord Hope of Craighead (Lord Scott of Foscote, Baroness Hale now Lady Hale of Richmond, Lord Carswell concurring) said: F G

> It is now well established that the physical presence of the defendant in the territory is not required so long as the effects of his actions are felt there. The rule is matched by its corollary which is that, if the effects of those actions were intentionally felt here, criminal jurisdiction can be exercised in respect of their effect irrespective of where the actions took place that gave rise to them. H

[83] *Vincenzo Melia v. United States of America and William F. Smith, Attorney General* 667 F 2d 300 concerned the extradition of a US resident from US to Canada. Canada alleged that Melia conspired with persons in Canada to murder the girlfriend of Melia's brother. Section 423(1)(a) of the I

A Canadian Criminal Code gave jurisdiction to Canadian courts over Melia, which jurisdiction Melia disputed. Article 3 s. 3 of the (extradition) treaty provided for extradition, if the act took place outside the requesting state and the laws of the requested state provided for jurisdiction over such offence committed in similar circumstances. That case concerned a special
B arrangement between the two countries. That case underscored that the 'effect approach' justifies the extension of territorial jurisdiction, where Timbers, Circuit Judge, cited the following statement of law from Justice Holmes in *Strassheim v. Daily*, 221 U.S. 280, 285 (1911):

> Acts done outside a jurisdiction, but intended to produce and producing
C detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect ...

[84] *Onwuzulike v. United States of America* [2009] EWHC 1395 (Admin) also affirmed that the 'effect approach' vindicates the jurisdiction of the requesting state. In that case, the US sought extradition of Onwuzulike, a
D United Kingdom citizen, from the UK to US to stand trial for mail fraud and wire fraud. The Crown Prosecution also wanted to prosecute Onwuzulike but agreed to the US prosecution to take precedence. On 9 July 2008, the secretary of state ordered the appellant's extradition. On 22 July 2008, Onwuzulike lodged a statutory appeal. One of the points raised against
E extradition was that the alleged offences were done in London. At issue was the appropriate forum, UK or US, and the impact of the offences, which being substantially more in the US than in any one single country, was one of the factors that decided it in favour of the US. It was on the basis of the impact or effect of the fraud that the requesting state asserted its jurisdiction.

F **[85]** As for *Mobarik Ali Ahmed v. The State of Bombay* and *Ajay Agarwal v. Union of India*, they were not extradition proceedings. They were trials of Indian citizens who initiated and or committed the offences abroad but which the Indian courts had jurisdiction to try those offences, although committed abroad, by reason of s. 188(a) of the Indian Criminal Procedure Code which
G provided that "when an offence is committed outside India, by a citizen of India, whether on the high seas or elsewhere, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found ... with the previous sanction of the Central Government", "such that the Indian Penal Code had territorial operation" (see para. 6 of
H *Ajay Agarwal*). *Loh Ah Hoo* concerned the prosecution of an offence committed within the local jurisdiction. All latter three cases were not authorities on the 'continuing approach' in extradition proceedings. But they said that where an offence is initiated abroad but completed within the local jurisdiction, the local jurisdiction could assert jurisdiction.

I

[86] *Re Nielsen* and *Norris v Government of the United States of America*, were more to the point. "In *Nielsen*, Lord Diplock (Lord Keith of Kinkel, Lord Roskill, Lord Bridge of Harwich and Lord Brightman concurring) enunciated that the starting point, to determine whether there is an extradition offence, is to inquire whether the conduct, if it had taken place in the requested state, would have fallen foul of the laws of the requested state:

> The introductory words to both the 1870 and the later list provide that the list of crimes is to be construed according to the law existing in England at the date of the alleged crime. So in order to determine whether conduct constitutes an "extradition crime" within the meaning of the Acts of 1870 to 1932, and thus a potential ground for extradition if that conduct had taken place in a foreign state, one can start by inquiring whether the conduct if it had taken place in England would have fallen within one of the 19 generic descriptions of crimes in the 1870 list. If it would have so fallen the inquiry need proceed no further where, as in the case of the principal treaty with Denmark, the extradition treaty with the foreign state demanding the surrender of a person as a fugitive criminal incorporates the whole of the 1870 list in the descriptions of crimes for which surrender may be required and makes no modification to those descriptions (see judgment of the learned President).

[87] The 'conduct test' was upheld in *Norris v. Government of the United States of America* and others, where Lord Bingham, delivering the composite opinion of the committee, said:

> The magistrate's task, in short, was simply to examine the evidence produced by the requesting state to decide whether, according to English law, it would justify the accused's committal for trial for a listed offence. As Lord Diplock made plain in successive decisions of this House in *Govt of Denmark v. Nielsen* [1984] 2 All ER 81, sub nom *Re Nielsen* [1984] AC 606 and in *United States Govt v. McCaffery* [1984] 2 All ER 570, [1984] 1 WLR 867, the conduct test was to be applied:
>
> > [T]he magistrate is not concerned with what provision of foreign criminal law (if any) is stated in the warrant to be the offence which the person was suspected of having committed and in respect of which his arrest was ordered in the foreign state. (See *Nielsen*'s case [1984] 2 All ER 81 at 91, [1984] AC 606 at 624.)
> >
> > [T]he test whether a person in respect of whom a warrant for his arrest had been issued in a foreign state for an offence alleged to have been committed in that state was liable to be surrendered as a fugitive criminal was not whether the offence specified in the foreign warrant of arrest as that for which it had been issued was substantially similar to a crime under English law falling within the list of offences described in Sch 1 to the Extradition Act 1870, as currently amended (ie the so-called "double criminality" test). The right test, as stated by the Divisional Court in *Nielsen*'s case, was whether the conduct of the accused, if it had been committed in

A England, would have constituted a crime falling within one or more of the descriptions included in that list. (See *McCaffery*'s case [1984] 2 All ER 570 at 572, [1984] 1 WLR 867 at 869) (see judgment of the learned President).

[88] It is not denied that the 'conduct approach' or 'conduct test' is both B apt and practical. To find a corresponding offence is to inquire into the conduct of the criminal fugitive and not to hunt for an identical offence by a minute examination and or comparison of the section of the law of the requesting state with that of the requested state, or by a scrutiny of the evidence. A corresponding offence is not an identical offence on all fours (see C *Mauro v. Government of the United States of America* [2009] EWHC 150 (Admin) para. 4). "An extradition judge is not vested with the function of considering the jurisdiction of the requesting state to prosecute the offence. The judge's role under s. 18(1)(b) of the Extradition Act is the modest one of determining whether the evidence would justify the fugitive's committal for trial under Canadian law if the crime had been committed in Canada. D Nothing in the Act requires the judge to consider where the acts charged took place, or the jurisdiction of the requesting state. The jurisdiction of the requesting state and its organs to prosecute a crime are matters governed by the law of that state. The determination of an extradition crime is conduct based so that the question to be asked is whether the impugned acts or E conduct, if committed in Canada, would constitute a crime here. The acts charged in this case would be a crime if committed in Canada. The so-called "double criminality rule" (no one in Canada should be extradited for behaviour that is not a crime in Canada) has been met. The 'mirror image' concept should not be adopted" (*United States of America v. Lépine* [1994] 1 F SCR 286, per the judgment of La Forest, L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ.).

[89] It is accepted that by application of the 'effect approach' or 'impact approach', jurisdiction may be rightly assumed. It is granted that on the basis of the alleged criminal conduct, alleged corresponding offences 4-7 were G similar to counts 1-3. But the instant issue had nothing to do with the 'effect approach' or 'continuing approach'. The issue was whether the appellant could be extradited, when he was not corporeally present in the US at the time of the commission of counts 1-3. The issue was whether the appellant could be extradited for extraterritorial offences. "At the heart of most H extraterritoriality cases lies the effects test" (*The Effects Test: Extraterritoriality's Fifth Business*, by Austen L. Parrish). "The effect principle is … to assert extraterritorial jurisdiction" (Ireland-Piper, Danielle – "Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law" [2012] MelbJlIntLaw 5; (2012) 13(1) I Melbourne Journal of International Law 122). "The 'effect approach' 'impact approach' or 'continuing approach' only rationalises the jurisdiction of the requesting state, as in *United States of America v. Frank Santo Cotroni*,

where it was held 'it is often better that a crime be prosecuted where its harmful impact is felt and where its witnesses and the persons most interested in bringing the criminal to justice reside' (per La Forest J delivering the judgment for Dickson CJ, La Forest, L'Heureux-Dube, Gonthier and Cory JJ) and a host of other cases. But the 'effect approach' 'impact approach' or 'continuing approach' will not change an extraterritorial offence to a territorial offence" (see judgment of the learned President). Counts 1-3 were yet extraterritorial offences. That important point was missed by both sides. Given that counts 1-3 were extraterritorial offences, then correspondingly, the corresponding offences in Malaysia had to be extraterritorial offences in Malaysia. "The dual criminality rule required extraterritoriality to extraterritoriality. That standpoint is reflected in the Treaty between Malaysia and the US. Article 2(5) reads:

> If the offence has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the requested state provide for punishment of an offence committed outside its territory in similar circumstances, and if the requirements of extradition under treaty are otherwise met. If the laws of the requested state do not so provide the executive authority of the requested state may, in its discretion, deny extradition. (See judgment of the learned President)

[90] Article 2(5) clearly provides that 'If the offence has been committed outside the territory of the requesting state, extradition shall be granted if the laws of the requested state provide for punishment of an offence committed outside its territory in similar circumstances ...'. Counts 1-3, which were committed outside the US, concerned the offences of conspiracy to defraud, smuggling and illegal export, which are punishable under the Code and or the Customs Act. But our laws do not provide for punishment of counts 1-3 committed outside our territory. They were extraterritorial offences in the US, but not in Malaysia. It was not 'as night follows day'. Hence, with respect, [I] must therefore rule that the statement in *PP v. Sajad Farhadi* No 44-217-12/2012, *to wit* 'it is observed that all these offences were not extraterritorial offence under s. 4 of the Penal Code. As such all offences are not extraterritorial in the US', was a wrong statement of law which should not be followed. (see judgment of the learned President).

[91] Article 2(5) provides that where there is no corresponding extraterritorial jurisdiction, the requested state may refuse extradition. Further, under the Extradition Act, an extradition offence is subject to the proviso that "in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia". In the light of art. 2(5) and said proviso, it was so clear that extradition offences had not been made out.

A **[92]** For completeness, I wish to add that whether the double criminality rule requires the conduct to be criminal at the conduct date or at the request date might not have been settled (see *R v. Metropolitan Stipendiary Magistrate, ex parte Pinochet (No. 3)* [2000] AC 147, at pp. 194-196; see also *International Extradition, United States Law and Practice*, 6th edn. by M Cherif Bassiouni at
B 502). But given that there was no cross-appeal against the ruling that the conduct dates of alleged corresponding offences 1-3 were before the Strategic Trade Act 2010 passed into law, I ought to leave that question to be answered on another occasion.

[93] It was for those reasons that I agreed with the result.

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